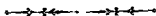


THE AUTOBIOGRAPHY OF HAZIN.



In the name of God, the merciful, the compassionate

A History of the events and a record of the
life of Mowlana Shaykh Muhammad Ali
Hazin, written by himself

QUATRAIN.

I wished for seclusion in the net which breaks one's wings and
feathers.

The world is not a place for that flight (i.e. soaring ambition)
which I had attempted

Even after death I would not bear the burden of any one's
obligations (and hence)

I wished for a shroud of ashes for the fire of my body

How long should one's heart bleed for weeping ?

How long should one meet great expenses with a small income ?

Comfort below the sky is impossible,

Until one frees himself from this sphere

Where is the power of speech (O God ?) that I may praise
You ?

And describe the perfection of Your greatness.

Nothing in our possession have we, the empty handed (i.e.
poor)

The soul alone which You have given me, I sacrifice to You

Since the best fruit and the choice capital on the stage of creation
is the acquisition of experience (warning) for man, [and it is on this
account that a number of wise people and those who know the value
of time, have engaged themselves in composing works on history and

writing an account of good and evil (news), and spent some of their time in this business, and in short, a study of biographies and chronicles is of innumerable benefits to all classes of men according to their different positions] and since this distracted man who had wasted his life in perplexity, considering his own condition with close observation, thought that an account of his past (life) will not be without the benefit of giving experience (warning) to the readers, [this being often the case, that in narrating the lives of others, the narrator falls into misrepresentation and mistake, while no such thing is possible, in giving one's own account,] therefore, he wished to engage himself in narrating some of his events which at this moment are preserved in his memory, and to observe brevity and shortness in it, so that the length of the discourse and the embellishment of style may not be the cause (inheritor) of fatigue to the votaries of wisdom, and whilst friends should have my memorial, the posterity should possess a historical account. It is expected of generous readers, that they will see the work with an eye of kindness and clemency and assist this exile of the lane of happiness by asking pardon for his sins. Oh God, grant us Your mercy and cause our business to reach the proper issue.

CHAPTER I.

The Ancestors of the Author.

I, a suppliant of *Giver of gifts*, Muhammad called Ali, am the son of Abu Taleb, son of Abdulla, son of Ali, son of Atta-ulla, son of Ismail, son of Ishaq, son of Noor-ud din Muhammad, son of Shehab-ud din Ali, son of Yacoob, son of Abd ul-wahid, son of Shams-ud-din Muhammad, son of Ahmed son of Muhammad, son of Jamal-ud din, son of the most illustrious Shaykh, the leader of the learned, Taj-ud-din Ibrahim, known as the Gilani hermit, may God consecrate their spirits and grant me a good end.

Of the ancestors of this humble person Shaykh Shehab-uddin Ali abandoned the town of Asta, both the native place and the burial place of the Shaykh, and took up his abode at the chief town of Lahijan which is the handsomest town of Gilan and since then, Lahijan became the abode of my ancestors. My ancestor Shaykh Ali, son of Ata ullah was among the famous learned men of his time. Ahmed Khan, the

Since you have taken away from me the hand of favour, oh, you
 adorner of the garden,
 I have become, like the weeping willow proverbial for my dis-
 traction
 You died at an old age, and I also have become old on account
 of grief
 With regret do I remember every moment my childhood
 O thou, the ninth heaven of elevation so long as I had not seen
 you concealed in the earth (i.e. buried)
 I did not know that the low earth could cover up a high hill
 Since you broke the thread of the volume of your body
 There is no more an instance of incomparableness to be found in
 the world
 On account of the collection of fire (of grief) I have my heart
 full of sighs,
 And I have forgotten my empty verses

CHAPTER III

The writer's birth—Wonders of memory.

A passion for composition in prose and verse A bodily accident
 A short description of some learned scholars.

Now a short account of the life of this humble man. My birth
 took place on Monday the twenty seventh of the second Rabi, A. H.
 1103, in the capital Isphahan. I still remember some of the events of
 the period of fosterage. When I came to the fourth year of my age,
 my late father gave direction for my instruction. At that time, the
 great Mulla Shah Muhammad of Shiraz, on whom be mercy, one of
 the famous men of his time, arrived at Isphahan. On the day when
 he was a guest in the house of my learned father this humble indi-
 vidual was presented to him for the auspicious commencement of my
 studies under his blessings. The above said Mowlana after saying
Bismillah made me repeat three times the following verses: "Oh God,
 expand my breast, lighten my task, and loosen the knot of my
 tongue, so that people may understand me." He then recited the
Fatiha and caressed me. In two years I was able to read and write

His offspring was restricted to Shaykh Abdulla. He acquired the sciences from his own father, and he was endowed with piety and abstinence from the world. Out of what he got of the means of livelihood and the inherited property, he was content with a little, and the rest he spent on friends and the needy. Three sons were left by him, Shaykh Atta ulla, Shaykh Abu Taleb, and Shaykh Ibrahim. Shaykh Atta ulla, his eldest son, was the foremost learned man of that country in jurisprudence and traditions and occupied a high position in piety and excessive worship. He died in his middle age and he left no offspring. Shaykh Ibrahim the youngest of the brothers was a learned man of his time, endowed with a lofty spirit and sagacity. Having acquired the current degrees in science he became the chief of his contemporaries. He wrote exceedingly well in the seven styles of caligraphy and would so imitate the handwriting of the masters that it was difficult to distinguish between the two. The holy *Koran* and the *Sahifah : Kamillah*, with translation were completed by him and were sent to my late father at Isphahan. Both of them were presented to this humble individual. The celebrated caligraphists of Isphahan were much profited by seeing them. He had great skill in the epistolary art and in composition. His letters are well known and transcribed in the books of the learned men. In poetry and enigmas he possessed a correct style. A times he was inclined to write poetry and these few couplets are his.

QUATRAIN.

The real wine is the blood / our hearts do not search for it
in the bottle
The true pearls are the tears of our eyes, do not look for them
in the ocean
We should not wander after Layla like Majnoon in the desert
Whatever you can find in the heart do not seek for it in the
desert

QUATRAIN.

In the garden of world there was no one familiar with the
secret
In the banquet of time there was no one who could sing a
melody

We closed our tongue, there being no fellow singer,
Because, one could not perform the modulations of music
alone

I was yet in my childhood when I arrived with my father at Lahijan and had the happiness to visit my exalted uncle. Really in noble qualities good manners, cheerfulness and socialness I have seldom seen one like him. Ten years before my learned father, he died at Lahijan. He left a son named Shaykh Mofid and two daughters. After a short time the son also died in the prime of youth.

CHAPTER II

A short account of my late father.

Now, my late father, at the age of twenty having acquired a knowledge of many literary subjects under the learned Mowlana Mullā Hasan the Shaykh al Islam (Chief Judge) of Gilan came to Isphahan on account of his great desire to visit the learned men of Irac. Here in the college of the master of the learned Aga Hussein of Khonsar, on whom be mercy the memory of whose merits and virtues is too well-known to need any comment he engaged himself in his studies. And having completed his mathematical studies under the Ptolemy of his age the learned Mowlana Muhammad Rafia known as Rafia of Yari, he was so deeply absorbed in study and discussion, as it would be possible for few students and up to the end of his life he kept the same style. A great body of students attained high degrees of knowledge by the blessing of his instruction. In his library there were more than five thousand volumes and not a single book of science was seen which had not been corrected by him from beginning to end, and many of the marginal notes written in his own writing. Nearly seventy volumes, some of which are Bayzawi's Commentary, the *Kamus-Elloghat* the *Shraih* : *Lamah*, the whole of *Tuh ib-i Hadis* and similar works, he had copied out with his own hands. He used to say, that very often in a night and day, he had written more than a thousand couplets. He had a handwriting very clear and beautiful. I have heard him say, "While my father was alive, I came to Isphahan and on account of the thought that perhaps I might fix my habitation at Isphahan, he would not send me money enough for my necessary expenses, and even that amount

was sent in small instalments in the course of the year. Consequently I had not enough money to buy books and wrote many of them with my own hands. After a time when my father died the idea of returning to Lahijan vanished from my mind."

In short he bought a house at Isphahan added to the structure, set out on a journey to Hijaz and through Syria having had the honour of going round the holy house of God he returned to Bagdad. He passed some time in the holy sepulchres of Irac and returned to Isphahan. Of the inhabitants of that place Haji Asad ullah Isphahani a pious and good man became friendly with him and married his daughter to him. His posterity consisted of four sons. The first offspring was this humble man and three others. One died in infancy, the other two in the prime of youth.

To be brief if I begin to write of his good qualities perfect morals, sublime mind and disposition, strength of faith and perfection of his accomplishments and intellect it will be very long and many will attribute it to exaggeration and to my good nature. Out of all the learned sciences there was not one in which he was not a perfect expert and in spite of this fact, he was never proud of his learning as is usual with other learned men and with the lowest students and the vulgars he behaved in an affable manner. Although he had passed the whole length of his life in discussion and giving instructions yet he always avoided contention, and hated such conduct. I have never seen any other accomplished man that was equal to him in eloquent speech and cheerfulness of temper. The sublimity of his spirit was such that in the eye of his magnanimous spirit, the world was not worth a handful of dust. Never would he endeavour to acquire wealth and pomp of the world which his lowest disciple with a little exertion could have acquired in the best possible manner. In his mind he never thought of wealth and bodily comfort. I have often heard him say, 'A piece of lawful bread which Providence has made our portion is sufficient for us and although the motive of acquiring worldly wealth, be for the patronage of others and offering to the needy, yet it cannot be done without debasing a faithful soul. In my opinion the height of generosity is not to covet but to leave alone, to the people that which is in their hands.' He was never eager in making acquaintance with

wealthy people, and with a number of princes, noblemen, and great men who were his friends and who observed the extreme respect for him, he behaved in a dignified manner. Such was his devotion and piety that in course of twenty five years that I have passed with him, I have never seen him doing any act which was objectionable in the eye of the law. I have never seen him lying in bed after midnight in any case, whether he was healthy or sick. Six or seven years before he died a desire of solitude and retirement overpowered his mind, and he left off discussion and society. He never undertook the management of the domestic affairs, but having made this humble individual his deputy in this affair, he would sometimes engage himself in reading and wept oftentimes. Most nights he kept vigil for prayers. He would never speak with any body, more than necessary and also did not like any one else to speak to him. At last, in A. H. 1127 at the age of nine-and sixty his disease became violent and he was overcome by weakness. In the morning which preceded the forenoon when he died he called me, and recommended to me his survivors and told me to behave well towards them. Then he said 'Just as you have pleased me, my God be pleased with you. My last command to you is this that how much-soever you do not find the affairs of the world according to your desire, and although the times be unsuitable to you you should never resign your will to meanness nor should you adopt the manners of parasites and servile persons, because this short life is not worth such debasement and if you can do not stay any more at Isphahan, so that some one of us may survive.' This humble individual did not understand those words till some years later, when confusion and ruin overtook Isphahan. Then he said, 'Do not forget doing for us whatever be possible and practicable on holy nights and days (i. e. give in charity as much as you can)'. A few hours after this he departed to the eternal world. His burial place is in the cemetery known as the shrine of Biba Rukn-uddin, close to the tomb of the learned divine, Mowlana Hasan of Gilan may God pour upon him streams of mercy and pardon, and make him a dweller in the garden of Paradise. I have composed an elegy on the death of this exalted person, and I write a few lines from it.

GAZAL.

O thou really pure man (lit pure wine of truth), the sky is over-
cast (lit impure) on account of thy death
The taste remains no more in an empty bottle

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12 C. W. N.	528	511	17 C. W. N.	1022	550
"	621	...	715,	716	1043	157
"	840	340	31	175
"	857	526	138	96
"	1010	...	...	341	266	...	...	...	706
"	1029	...	...	510	464	...	...	...	212
13 C. W. N.	212	...	...	410	466	...	...	...	508
"	407	...	...	511	480	...	...	...	444
"	533	...	694,	710	626	...	41,	655	
"	557	...	107,	117A	904	597	
"	696	715	1266	...	172,	669	
"	698	597	1288	716	
"	1010	393	18	511	
14 C. W. N.	121	410	102	374	
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"	128	98	174	477	
"	357	...	683,	724	237	197	
"	439	553	263	...	178,	116	
"	486	...	714,	715	287	70313	
"	560	669	386	...	241,	543	
"	1001	...	...	452	473	...	144	611	
15 C. W. N.	71	...	...	714	553	...	...	177	
"	102	...	156A,	661,	649	...	...	611	
"	107	...	...	665	650	...	...	985	
"	205	...	...	517	860	...	...	181	
"	259	...	...	679	935	...	...	211	
"	524	...	...	233	970	...	...	41	
"	661	...	493,	591	1113	...	...	21	
"	787	...	...	715	1193	...	...	1	
"	845	...	127,	646	1290	...	...	1	
"	882	...	4,	74,	673	...	...	1	
"	965	...	...	477	49	...	...	1	
16 C. W. N.	20	...	3,	172,	669	...	...	1	
"	96	...	...	32	58	...	...	1	
"	299	...	...	212	178	...	...	1	
"	346	...	...	453	232	...	...	1	
"	351	...	178,	191	...	...	...	1	
"	396	...	...	242	...	...	...	1	
"	398	...	205,	683	...	...	...	1	
"	423	...	...	2	...	...	...	1	
"	634	...	...	191	...	...	...	1	
"	643	...	597,	621A	...	...	...	1	
"	721	...	...	665	...	...	...	1	
"	849	...	...	32	...	...	...	1	
"	894	...	...	620	...	...	...	1	
"	971	...	170,	172	...	...	...	1	
"	1040	...	...	279	...	...	...	1	
"	1073	...	401,	402	...	...	...	1	
17 C. W. N.	5	...	...	599	...	...	...	1	
"	55	...	...	414	...	...	...	1	
"	308	...	258,	333	...	...	...	1	
"	369	...	319,	343	...	...	...	1	
"	389	...	...	431	...	...	...	1	
"	478	...	...	600	...	...	...	1	
"	554	...	...	172	...	...	...	1	
"	667	...	...	299	...	...	...	1	
"	807	...	25,	77,	80	...	...	1	
"	959	...	...	46,	49	...	...	1	
"		...	...	702	...	...	...	1	

				NOTE No.					NOTE No.
Lower Burma Rulings.									
8 L. B. R.	149	406	3 Mad.	256	719
	422	8	"	359	481
9 L. B. R.	71	28	"	384	173
"	78	206	4 Mad.	155	...	17, 642, 697,	700
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					"	172	8, 691
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					"	302	275
					"	419	...	23, 122,	134
I L. R. Lucknow Series.					5 Mad.	54	281
1 Luck.	66	620	"	91	106
"	153	699, 715	"	113	674
"	273	...	...	620A, 626	"	141	...	...	715
"	423	...	...	564	"	169	...	...	190
"	428	...	...	691	"	171	...	...	191
"	441	...	...	600, 612	"	189	...	...	35
"	469	...	...	612	"	226	...	...	238
"	529	...	...	561, 614	"	388	...	...	312
"	569	...	...	711, 715	6 Mad.	54	...	...	117
2 Luck	172	...	...	620	"	181	...	...	175
"	180	...	...	210	"	176	...	221,	317
"	239	...	...	618	"	182	...	...	180
"	419	...	...	708	"	250	...	...	712
"	447	...	...	123	"	281	...	...	198
"	618	...	...	615, 623	"	290	...	...	388
"	686	...	...	554	"	325	...	...	180
3 Luck.	102	...	...	312A	"	344	...	430,	433
"	241	...	...	218	"	351	...	...	628
"	439	...	...	554	"	402	...	109,	372
"	580	...	...	714	"	417	...	...	550
"	668	...	...	621B	7 Mad.	1	...	...	404
"	684	...	...	683, 691, 715	"	55	...	...	200
"	719	...	...	706	"	76	...	...	200
4 Luck	107	...	...	483	"	80	...	...	719
"	209	...	...	668, 695	"	83	...	...	719
"	270	...	...	422	"	99	...	...	263
"	480	...	...	389A	"	100	...	...	265
"	503	330	"	258	281
					"	306	715
					"	307	715
					"	337	116
					"	341	540
					"	392	180
					"	417	118
					"	512	281
					"	539	204
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					"	137	693
					"	175	302
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					"	424	...	583,	584
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I. L. R. Madras Series.									
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"	335	221					
"	391	275					
2 Mad	5	10A					
"	174	716					
"	226	616					
"	306	290					
"	314	641					
"	400	120					
"	407	148					
3 Mad	61	393					
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"	79	721					
"	107	308					
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"	240	309					

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"	271	...	201	"	26	420
"	285	...	612, 644	"	38	614
"	334	...	354	"	61	117
"	450	...	70	"	81	50
"	457	...	281, 430	"	96	625
"	482	...	531	"	158	118
10 Mad	66	...	718	"	237	533
"	100	...	481	"	252	721
"	115	...	540, 543, 611	"	258	186
"	189	...	614	"	396	719
"	199	...	405	"	465	488
"	210	...	42	"	495	585
"	213	...	420	15 Mad.	6	420
"	259	...	177, 406	"	57	532
"	292	...	121	"	60	517
"	357	...	60	"	78	23
"	375	...	118	"	101	644
"	509	...	548	"	123	607
11 Mad.	56	...	481	"	157	...	341, 348	133
"	103	...	159, 694	"	169	...	531, 533	447
"	153	...	356, 398	"	186	...	625, 642, 644	578
"	218	...	194	"	258	...	181, 355, 477	377
"	274	...	117	"	315	649
"	332	...	9	"	331	215
"	333	...	317, 346	"	380	188
"	336	...	716	"	382	508
"	345	...	306	"	414	517
"	380	...	533	"	417	507
"	413	...	550	"	491	420, 500
"	416	...	553, 615	"	492	712
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"	161	...	393	"	142	232
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"	467	...	32, 158	"	311	716
"	479	...	703A	"	361	118
"	487	...	514	"	366	219
13 Mad.	135	...	187	"	436	711
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"	447	...	35	"	189	
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"	71		221, 321	"	275		317, 477
"	171		509, 541	"	295		35
"	173		644	"	321		421
"	187		724	"	356		567B
"	256		126	"	374	19, 27,	393
"	260		582	"	396	78, 509A,	524
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"	308		441	"	419		703B
"	362	612,	644	"	432		337
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"	143		430	"	442		667
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"	221		190	"	695	223, 708,	715
"	284		91	"	783		342
"	292		685	"	887		440
"	438		466	"	903		616
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35 Mad	35		275	"	1099	454,	532
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"	92	244,	522	"	1125		330
"	114		614	"	1171		436
"	142		207	39 Mad	1	6, 253,	309, 359
"	231		616	"	54		465
"	618	597, 620, 621A		"	62		151, 378
"	636	348, 349,	628	"	74		158
"	678	3,	661	"	129		389
36 Mad.	66		394	"	376		410, 416
"	68		177	"	456	1, 420,	520
"	97		616	"	544		692
"	104	693, 703A,	705	"	593		136, 245
"	131	37,	155	"	617		625, 644
"	135		703	"	634		526
"	185		453	"	640		710
"	203		538	"	645		4
"	293	93, 95		"	750		648
"	383	509		"	811		568, 616
"	482	155		"	879		620
"	553	694, 694A		"	936		154
"	570	78, 82, 525A		"	981	394, 549, 554A	
"	575	329, 420		"	1026		683
37 Mad	146		207	"	1031		281
"	175	169, 627, 628		"	1081		361
"	186	73, 75, 696		"	1196		278
"	231		710	40 Mad.	291		370, 508
"	381		341	"	678		342
"	423		614	"	687		679
"	462		662	"	698	178, 179,	193
"	540		466	"	701	19, 100,	177
"	545		614	"	722		211
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"	1009	...	671	"		...	564, 567B
"	1040	...	559, 561, 641	"	883	...	612, 625
"	1069	...	710	"	902	...	277
"	1127	...	724	"	951	...	6, 83, 559,
41 Mad.	1	...	410, 416, 418	"		...	565, 588
"	4	...	14, 522	"	971	...	203
"	18	...	2, 474	"	984	...	326
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"	102	...	87, 331	"	70	...	277, 286, 378
"	124	...	567B	"	90	...	273
"	169	...	136	"	202	...	714, 715
"	251	...	205, 708	"	361	...	76
"	319	...	117A	"	370	...	600, 604
"	412	...	25A, 45, 70	"	378	...	456
"	427	...	207	"	415	...	104, 109
"	446	...	141, 181, 195	"	443	...	177
"	450	...	623	"	466	...	714, 716
"	528	...	318, 449	"	628	...	41
"	650	...	527, 529	"	633	...	232
"	659	...	78, 509A, 524	"	641	...	472
		...	525A, 526	"	648	...	372, 410, 463, 531
"	849	...	277	"	785	...	32, 161
"	943	...	650	"	1014	...	710
"	985	...	273	46 Mad.	40	...	440
42 Mad.	33	...	480	"	190	...	514, 515
"	52	...	191	"	259	...	106, 109, 358
"	302	...	386	"	488	...	164, 293
"	319	...	162	"	502	...	293
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ABBREVIATIONS EXPLAINED.

(English Reports)

A. C. or App. Cas.	...	Law Reports, Appeal Cases
A. & E.	...	Adolphus & Ellis' Reports, King's Bench.
Atk.	...	Atkyns Reports.
B. & Ad.	...	Barnewall and Adolphus' Reports
B & C.	...	Barnewall and Cresswell's Reports.
Bing	...	Bingham's Reports.
Burr	...	Burrow's Reports
Camp	...	Campbell's Reports.
C B.	...	Common Bench Reports
C. & M.	...	Crompton and Meeson's Reports, Exchequer.
C. M. & R.	...	Crompton, Meeson and Roscoe's Reports
Ch or Ch. D.	...	Law Reports, Chancery Division
DeG. & J.	...	DeGex and Jones' Reports
DeG. J. & S.	...	DeGex, Jones and Smith's Reports
D & L.	...	Dowling and Lowndes' Reports.
East	...	East's Reports
E. & B.	...	Ellis and Blackburn's Reports.
Eq	...	Equity Reports
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Ex or Exch.	...	Exchequer Reports.
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H & C	...	Hurlstone and Colman's Reports
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L. R. Eq	...	Law Reports, Equity Cases
L. R. Ex.	...	Law Reports, Exchequer
L. R. Q B.	...	Law Reports, Queen's Bench
L. T. (N. S.)	...	Law Times (New Series)
Lev.	...	Levinz's Reports.
M. & C.	...	Mylne and Craig's Reports
M. & G.	...	Macnaghten and Gordon's Reports
M & S.	...	Maule and Selwyn's Reports
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R & M.	...	Russel and Mylne's Reports.
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T. R	...	Terms Reports

DISTRICT MAGISTRATE OF
ABU.

THE
INDIAN LIMITATION ACT.

ACT No. IX OF 1908.

PASSED BY THE GOVERNOR-GENERAL OF INDIA
IN COUNCIL.

(Received the assent of the Governor-General on the
7th August, 1908).

An Act to consolidate and amend the law for the Limita-
tion of Suits, and for other purposes.

WHEREAS it is expedient to consolidate and amend
the law relating to the limitation of suits, appeals
and certain applications to Courts; and whereas it is also
expedient to provide rules for acquiring by possession the
ownership of easements and other property; It is hereby
enacted as follows:—

1. Object:—The object of the Limitation Act is to quiet long
possession and extinguish stale demands—*Luchmee v. Runjeet*, 20 W.R.
375 (377) (P.C.) Statutes of limitation are statutes of repose, to quiet
titles, to suppress frauds, and to supply the deficiency of proofs arising
from the ambiguity and obscurity or the antiquity of transactions. They
proceed upon the presumption that claims are extinguished or ought to
be held extinguished whenever they are not litigated within the prescribed
period. They quicken diligence by making it in some measure equivalent
to right. They discourage litigation by burying in one common receptacle
all the accumulations of past times which are unexplained and have now
from lapse of time become inexplicable. It has been said by John Voet
that controversies are limited to a fixed period of time, lest they should
be immortal, while men are mortal"—*Story's Conflict of Laws*, 8th Edn.,
p. 794. For this reason the statute of limitation has been termed a statute
of repose, peace and justice—*Mangu v. Kandhai*, 8 All. 475 (484), *Jag Lal*
v. Har Narain, 10 All. 524 (529); *Tolson v. Kaye*, (1822) 3 Brod. & Bing.
222 (223) (per Dallas C.J.); *Hunter v. Gibbons*, (1856) 26 L.J. Ex. 5

(per Bramwell B). "All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost, and in all well regulated countries, the quieting of possession is held an important point of policy"—per Lord St. Leonards in *Trustees of the Dundee Harbour v. Dougall*, (1852) 1 Macqueen H L 321. "The public have a great interest in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost."—Per Plumer M.R. in *Cholmondelay v. Clinton*, 2 Jac. & W. 140. Statutes of limitation are definite rules of law giving to the population for whom those laws have been framed a guarantee that after the lapse of a certain period they may rest in peace and rely upon titles or other rights which they have acquired—*Ramjiwan v. Chand Mal*, 10 All 587 (595). The object of the Act is not to create or define causes of action but simply to prescribe the period within which existing rights can be enforced in Courts of law—*Suryamani v. Kalikanta*, 28 Cal 37 (46), *Jivi v. Ramji*, 3 Bom. 207, *Binda v. Kaunsilia*, 13 All 126 (142). The principle of the Act is not to enable suits to be brought within certain periods, but to forbid them from being brought after periods, each of which starts from some definite event—*Hurry Bhasan v. Upendra*, 24 Cal 1 (7) (P.C.). "The intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right"—per Sir Richard Couch in *Hurrynath v. Mothoor*, 20 I A 183, 21 Cal 8 (18) (P.C.), *Ram Narain v. Barkandi*, 12 O L J 77, 86 I C. 725, A.I.R. 1925 Oudh 400; *Kalicharan v. Sukhoda*, 20 C.W.N. 58 (61). The Limitation Act merely prescribes a period for the institution of a suit, and does not of itself create an obligation to sue where none existed—*Narayanan v. Lakshmanan*, 39 Mad 456 (458).

2. Construction :—The Act of Limitation, being an Act which takes away or restricts the right to take legal proceedings, must, when its language is ambiguous, be construed strictly, i.e., in favour of the right to proceed—*Umashankar v. Chhotalal*, 1 Bom 19 (22); *Collector v. Rajaram*, 7 Bom. 542 (545); *New Fleming Spinning Co. v. Kessowji*, 9 Bom. 373 (402); *Balvant v. Secretary of State*, 29 Bom 480 (498), *Venkanna v. Venkata Krishnayya*, 41 Mad. 18 (22), 33 M L J 35, 41 I C. 807; *Sundar v. Salig Ram*, 26 P.R. 1911, 9 I.C 300 (302) (F.B.); *Dheru v. Sidhu*, 56 P R 1903 (per Chatterji J.); *Deutsche Asiatische Bank v. Hiralal*, 47 I.C. 122 (Cal); *Murlidhur v. Mulu*, 11 N.L.R. 18, 27 I.C 935 (936). Where the interpretation sought to be put upon the technical words of a Statute like the Limitation Act is arrived at by implication and inference, the Court ought not to adopt a construction which has a restricting and penalising operation, unless it is driven to do so by the irresistible force of language—*Abdul Karim v. Islamunnissa*, 38 All 339 (343).

No man is to be deprived of rights which would by law belong to him, unless the specific provisions of law which are alleged to take away those rights can be shown to apply clearly and in precise terms to his case—*Sundar v. Salig Ram*, *supra*. The provisions of this Act, when set up as a defence, must not be extended to cases which are not strictly within the enactment, whilst exceptions or exemptions from its operations are to be construed *liberally*—*Poorna v. Sassoon*, 25 Cal. 496 (503), *Roddam v. Morley*, 1 DeG & J. 1 (23). "A statute of Limitation, like any other statute, must be interpreted in accordance with the fair meaning of the language used, and a litigant who relies upon it must bring his case within its terms as so interpreted"—*Lightwood's Time Limit on Actions*, p. 2. The Act ought to receive such a construction as the language in its plain meaning imports—*Luchmee v. Runjeet*, 20 W R. 375, 377 (P.C.). It should not be so interpreted as to include cases not falling within the strict meaning of the words used—*In re Ramshankar*, 3 C.L.R. 400; *Parashram v. Rakhma*, 15 Bom. 299.

In certain Allahabad cases, however, Mahmood J. has expressed the opinion that statutes of limitation must be construed strictly in favour of their operation *i.e.*, against the right to take legal proceedings—*Mangu v. Kandhai*, 8 All 475 (484). The learned Judge has also remarked that statutes of limitation are statutes of repose, intended to check tendency of dilatoriness, and they should be administered not slackly but as strictly as possible in order to strengthen the repose at which they aim. The rule of limitation is not to be administered as a lax system to be modified, varied or fluctuating according to the individual views or wishes of the Judge—*Ramjiwan v. Chand Mal*, 10 All. 587 (595, 596), *Jag Lal v. Har Narain*, 10 All 524 (529).

In construing the Limitation Act, the Courts cannot allow any question of hardship to influence them, where the wording of the Act is plain and unambiguous. They have to construe the Acts of the Legislature as they find them, whether they approve of them or not—and not to alter or amend them. They have no power to read into the Limitation Act an article which is not there or any section or words which it does not contain—*Balkaran v. Gobind*, 12 All. 129 (137) F.B. The construction of Acts not in *pari materia* with the Limitation Act (*e.g.* the Court Fees Act) cannot be called in aid of the construction of the Limitation Act—*Dayachand v. Hemchand*, 4 Bom 515 (526) (F.B.), *Assan v. Pathumma*, 22 Mad 494 (502). The various articles dealing with a variety of particular cases should be so construed as to make them harmonious and consistent—*Sati Prasad v. Jogesh*, 31 Cal 681 (684) (F.B.), 8 C.W.N. 476, *Amme Raham v. Zia Ahmed*, 13 All 282 (284) (F.B.). The language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party—*Muthukorakkai v. Madar Ammal* 43 Mad 185 (213) (F.B.). If there is a conflict between two periods of limitation, one of which, the longer, is applicable to all circumstances, and the other, the shorter, to special circumstances only, the longer term given by the statute to bring

the suit ought to be applied, unless there is clear proof of the special circumstances which would make the shorter term applicable—*Tara Nath v. Iswar Chandra*, 16 C.W.N. 398 (401), following *Crum v. Johnson*, [1902] 92 N.W. 1054.

3. Which Law applicable :—The general rule is that a statute of limitation is retrospective in its operation and governs all proceedings from the moment of its enactment, even though the cause of action might have accrued before the Act came into existence—*Bajinath v. Doolarey*, 50 All. 865, 26 A.L.J. 1317, A.I.R. 1928 All. 708, 110 I.C. 719. Hence, the law of limitation applicable to a suit or proceeding is the law in force at the date of institution of the suit or proceeding, unless there is a distinct provision to the contrary—*Soni Ram v. Kanhaiya*, 35 All. 227 (234) (P.C.); *Begam Sultan v. Sarvi Begum*, 48 All. 121, 90 I.C. 274, A.I.R. 1926 All. 93; *Gurupadapa v. Virabhadrapa*, 7 Bom. 459 (462); *Gangaram v. Secy. of State*, 21 S.L.R. 195, A.I.R. 1927 Sind 270 (271). Thus, a suit brought in 1904 on a mortgage executed in 1870 would be governed by the Limitation Act of 1877, not by the Act of 1859—*Soni Ram v. Kanhaiya*, 35 All. 227 (235) (P.C.). If an *ex parte* decree is passed when the Act of 1877 is in force, and the application for setting aside the decree is made when the Act of 1908 comes into operation, the application would be governed by the latter Act—*Jia Bibi v. Ilahi*, 37 All. 597 (600); *Monohar v. Sadiqa*, 101 P.R. 1916, 37 I.C. 292 (294), *Chidambaram v. Karuppan*, 35 Mad. 678 (679); *Zaibunissa v. Ghulam Fatima*, 70 P.L.R. 1911, 10 I.C. 823. If a sale takes place before 1908, and an application to set aside the sale (Art. 166) is made after the passing of the Limitation Act of 1908, it will be governed by the new Act—*Rai Kishori v. Mukunda*, 15 C.W.N. 965 (971), 11 I.C. 295. An application for execution is governed by the Act in force at the time when the application is made, and not by the Act which was in force at the time when the decree was passed—*Gurupadapa v. Virabhadrapa*, 7 Bom. 459 (463), distinguishing *Mungul v. Grijakant*, 8 Cal. 51 (P.C.) and *Behary v. Gobaradhan*, 9 Cal. 446. No one has a vested right in any period of limitation. It cannot be said that there is any substantive right in an appellant to wait for a particular period of time before filing the appeal. Rules of limitation are rules of procedure, and the rules applicable to an appeal would be the rules which are in force at the time when the appeal is filed—*Bajinath v. Doolarey*, supra. A suit is governed by the law of limitation which is actually in force at the time when it is instituted; thus, a suit brought in September 1877 was governed by the Act of 1871, and not by the Act of 1877, because the latter Act came into force from 1st October 1877, although it was passed on 19th July 1877—*Mohesh v. Busunt*, 6 Cal. 340 (347).

4. The law of limitation is not always a law of procedure, that is to say, a purely adjective law; for amongst its other consequences it has the creation of rights by prescription; and if those rights have vested in individuals under one law of limitation, they cannot be divested by the introduction of a new law of limitation, or by an amendment in the law—*Gajanan v. Waman*, 12 Bom.L.R. 881, 8 I.C. 189; *Moro v. Balaji*, 19

Bom. 809 (814); *Gangaram v. Secy. of State*, 21 S.L.R. 195, A.I.R. 1927 Sind 270 (271) The repeal of a Statute or other legislative enactment cannot, without express words or clear implication to that effect in the repealing Act, take away a right acquired under the repealed statute or other enactment while it was in force—*Sitaram v. Khanderav*, 1 Bom. 286 (291), *Fazal Karim v. Annada*, 15 C.W.N. 845 (847), *Baijnath v. Doolarey*, 26 A.L.J. 1317, A.I.R. 1928 All 708, 50 All 865, *Sahib Dad v. Rahmat*, 90 P.R. 1904 (F.B.), 88 P.L.R. 1904 When the retrospective application of a statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, the statute is not, any more than any other law, to be construed retrospectively—*Khushalbhai v. Kabhai*, 6 Bom. 26; *Gopeswar v. Jiban Chandra*, 41 Cal. 1125 (1140) (S.B.), *Ram Ditta v. Tehlu*, 4 P.R. 1902, 153 P.L.R. 1901; *Ramakrishna v. Subbaraya*, 38 Mad. 101 (103), 24 M.L.J. 54, 18 I.C. 64. Where an Act contains provisions for the limitation of suits which take away altogether a vested right of suit, without providing any equivalent remedy, then according to the approved rule of construction, the provisions must be considered to have been enacted subject to the implied exception that they were not to extend to such vested rights of suit which were to continue subject to the rules of limitation in force at the time of the passing of the Act—*Rajah Pittapur v. Venkata*, 39 Mad. 645 (650), 29 M.L.J. 1, 30 I.C. 94 (F.B.). “When a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act”—per Wilde B. in *Wright v. Hale*, (1860) 30 L.J. Ex. 40, 6 H. & N. 227 (232), *Hope Mills Ld. v. Vithaldas*, 12 Bom.L.R. 730, 7 I.C. 982 (985).

Similarly, a suit or application which has been already barred by the old Act cannot be revived by the new one—*Jia Singh v. Surya*, 31 All. 495; *Khunnilal v. Govind*, 33 All. 356, 15 C.W.N. 545 (551) (P.C.), *Mohesh v. Taruck*, 20 Cal. 487 (P.C.), *Nepal v. Niroda*, 39 Cal. 507 (509); *Fatimatulnissa v. Sundar Das*, 27 Cal. 1004 (1011) (P.C.), *Shumbhoonath v. Guruchurn*, 5 Cal. 894; *Nursing v. Hurryhur*, 5 Cal. 897, *Jagamba v. Ram Chandra*, 31 Cal. 314, *Vinayak v. Balaji*, 4 Bom. 230, *Dharma v. Govind*, 8 Bom. 99, *Mahomed Mehdi v. Sakinabai*, 37 Bom. 393, *Narayan v. Govind*, 29 Bom. L.R. 1563, A.I.R. 1928 Bom. 28 (31), *Dhondi v. Lakshman*, 31 Bom. L.R. 1287, A.I.R. 1930 Bom. 55 (57); *Appasami v. Subramanya*, 12 Mad. 26 (P.C.), *Teka v. Sohnu*, 39 P.R. 1901; *Khan v. Hakim*, 97 P.R. 1905. *Somasundaram v. Vaithilinga*, 40 Mad. 846, 41 I.C. 546. So also, a judgment or decree which had become unenforceable by lapse of time before the passing of the present Act cannot be revived or made effective by any retrospective operation of this Act—*Sachindra v. Maharaja Bahadur*, 49 Cal. 203 (214), 26 C.W.N. 859 (P.C.).

It should be noted in this connection that section 2 of the Limitation Act of 1877 contained a provision that “Nothing herein contained shall

be deemed to affect any title acquired or to revive any right to sue barred under the Limitation Act, 1871." But this clause has been omitted in the Act of 1908, in view of a similar provision existing in the General Clauses Act. Section 6 of the General Clauses Act (X of 1897) provides that the repeal of any enactment "shall not revive anything not in force or existing at the time of the repeal or affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed."

5. Pending proceedings :—Since the law of limitation applicable to a suit or proceeding is the law in force at the date of institution of the suit (see Note 3 above), any change in the law of limitation during the pendency of a suit does not affect the proceedings. A suit is governed by the provisions of the statute of limitation in force at the time of its institution and not by the provisions of a subsequent statute coming into operation during the pendency of the suit—*Maula Baksh v. Bhaba Sundari*, 19 C.L.J. 187 (188), 19 I C 968.

6. Applicability of sections and articles .—The applicability of particular sections of the Limitation Act ought to be determined by the character of the thing sued for, and not by the status, race, character or religion of the parties—*Fattehsangji v. Dessai*, 21 W R. 178 (P.C.).

When there are two articles which may possibly govern a case, the one more general and the other more particular and specific, the latter ought to be applied—*Sharoop v. Joggesur*, 26 Cal. 564 (F.B.); *Issur v. Jiban*, 16 Cal. 25, *Mangu v. Dolhin*, 25 Cal. 692 (698, 699); *Natesan v. Soundararaja*, 21 Mad 141, *Municipal Board v. Goodall*, 26 All. 482; *Madras Steam Navigation v. Shalimar Works*, 42 Cal 85; *Ranchordas v. Parbatibai*, 23 Bom 725; *Narmadabai v. Bhavanishankar*, 26 Bom. 430; *Md Mozaharal v. Md Azimuddin*, 27 C.W.N 210, *Tofa Lal v. Moinuddin*, 4 Pat. 448, A I R. 1925 Pat. 765; *Venkatasubba v. Asiatic Steam Navigation Co*, 39 Mad 1 (12); *Sesha Naidu v. Periasami*, 44 Mad. 951 (957). But if two articles limiting the period for bringing the suit are wide enough to include the same cause of action, and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should generally, and apart from other equitable considerations, be preferred—*Tofa Lal v. Moinuddin*, (supra).

7. "Suit" .—The Limitation Act is applicable to suits brought by the plaintiff; it does not apply to a right set up by the defendant in defence. A defendant will not be precluded from setting up a right by way of defence, even if he could not have done so as plaintiff by way of substantial claim—*Deodhari v. Dayanand*, 35 I C. 610 (611) (Cal); *Sri Krishna v. Kashmiro*, 20 C.W.N 959 (966, 967) (P.C.); *Akbar v. Ragnandan*, 57 I.C. 348 (349) (Lah); *Kamra v. Bishambar*, 147 P.R. 1890 (F.B.); *Venkatachalapathi v. Robert Fischer*, 30 Mad. 444 (445), *Lakshmi Doss v. Roop Laul*, 30 Mad. 169 (178); *Meherban v. Raghunath*, 5 O L.J. 768, 49 I.C. 115; *Raisunnissa v. Zorawar*, 1 Luck. 92, 29 O C. 118, 92 I.C. 675, A.I R 1926 Oudh 228; *Mahadev v. Sadashiv*, 45 Bom 45; *Mg. Po Kywe v. Mg. Po Thin*, 7 Rang. 288, A.I.R 1929 Rang. 251; *Ram Kishore*

v. *Ram Nandan*, 25 A.L.J. 1080, A.I.R. 1928 All. 99. But where a suit by the defendant would have been barred under sec. 26 or 28, the defendant cannot set up his right by way of defence—*Mahadev v. Sadashiv*, 45 Bom. 45 (49), 22 Bom. L.R. 1082, 59 I.C. 118.

7A. Arbitration proceedings :—Though not applicable in terms, the Limitation Act would apply to arbitration proceedings, and an arbitrator is bound to give effect to all legal defences including a defence under the statute of limitation, unless there was an express agreement between the parties to exclude defences under the Limitation Act—*Ramdutt v. E. D. Sassoon & Co.*, 56 Cal 1048 (P.C.), 33 C.W.N. 495 (491), 49 C.L.J. 462, 31 Bom. L.R. 741, 27 A.L.J. 254, 115 I.C. 713, A.I.R. 1929 P.C. 103, 56 M.L.J. 614

8 Certain applications —It should be noticed that this Act does not provide for all kinds of applications to Court, but is limited to certain applications mentioned in the 1st schedule. The following applications are not covered by this Act :—

(1) An application for a certificate to collect the debts due to the estate of a deceased person—*Janaki v. Kesavalu*, 8 Mad 207, (2) an application for probate—*In re Ishan Chunder*, 6 Cal 707 (709), *Bai Manekbai v. Manekji*, 7 Bom 213 (214), *Gnanamuthu v. Vana*, 17 Mad 379 (381), (3) an application for letters of administration—*Kashi Chundra v. Gopikrishna*, 19 Cal 48, *Bai Manekbai v. Manekji*, 7 Bom 213, (4) an application under the Religious Endowments Act, or an application for the appointment of new trustees—*Janaki v. Kesavalu*, 8 Mad 207, (5) an application to a Court to exercise the functions of a ministerial character (e.g. an application for the grant of a sale-certificate)—*Kylasa v. Ramasami*, 4 Mad 172, *Vithal v. Vithoji*, 6 Bom 586 (587) *Laxmi v. Tukaram*, 26 N.L.R. 166, A.I.R. 1930 Nag. 206, *Moolla Cassim v. Moolla Abdul*, 35 I.C. 950 (951), 8 L.B.R. 422 (6) the Limitation Act must be held to apply to applications for the exercise, by the authority to which the application is addressed, of powers which it would not be bound to exercise without such application, and does not apply to an application to a Court to do what the Court is bound to do and has no discretion to refuse to do—*Darbo v. Kesho*, 9 All 364 *Balaji v. Kushaba*, 30 Bom 415, *Madhabmoni v. Lambert*, 37 Cal 796; *Laxmibai v. Tukaram*, supra, *Moolla Cassim v. Moolla Abdul*, supra; as for example, an application to a Court to pass judgment according to an award—*Iswardas v. Dosibai*, 7 Bom 316, or an application for a certificate of sale by a purchaser of land at a Court sale—*Devidas v. Purjada*, 8 Bom 377, *Kylasa v. Ramasami*, 4 Mad 172. See notes under Art. 181.

9. Criminal proceedings —The Limitation Act does not apply to criminal proceedings unless it is made applicable to them by express provisions—*Q v. Amteroddeen*, 15 W.R. 25 (Cr.), *Q v. Nageshappa*, 20 Bom. 543 (546) *Q.E. v. Ajudhia Singh* 10 All 350, *In the matter of Kittu*, 11 Mad 332. Thus, an application for sanction under Sec. 195, Crim. P. Code was not governed by any rule of limitation—*Q.E. v. Ajudhia Singh*, 10 All 350, *Q v. Nageshappa* 20 Bom.

543. Act XIII of 1859 (Workmen's Breach of Contract Act) being a penal enactment, the Limitation Act is no bar to a claim under Sec 2 of that Act to recover an advance made to a labourer—*In the matter of Kittu*, 11 Mad. 332. Certain criminal appeals are specially provided for in Articles 150, 150A, 154, 155 and 157.

9A. The Act is a complete Code .—The Limitation Act, being the enactment of the Legislature which has dealt with all matters connected with the limitation of all actions, appeals, applications and so on, is a complete code; and no Court would be entitled to invoke any principle for the purpose of holding a claim as not barred by the law of limitation, which is not contained or necessarily implied in any of the sections or articles of the Limitation Act—*Ammalu v. Narayanan*, 51 Mad. 549, 111 I.C. 210, A I R 1928 Mad. 509 (513). See also *Ram Charan v. Goga*, 49 All. 565, A I R. 1927 All 446, 102 I.C. 96; *Sarat Kamini v. Nagendra*, 29 C.W.N. 973, A I R 1926 Cal 65; *Satyanarayana v. Seethayya*, 50 Mad. 417, A I R. 1927 Mad 597.

PART I.

PRELIMINARY.

Short title, extent
and commencement.

1. (1) This Act may be called the Indian Limitation Act, 1908.

(2) It extends to the whole of British India; and

(3) This section and section 31 shall come into force at once. The rest of this Act shall come into force on the first day of January, 1909.

10. British India :—"British India" shall mean all territories and places within Her (His) Majesty's dominions which are for the time being governed by Her (His) Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India—Sec 3 (7), General Clauses Act (X of 1897)

This Act applies to the Agent's Court at Aden which is included in the Bombay Presidency, and to non-regulation Provinces and the scheduled Districts—*Q E v Cheria Koya*, 13 Mad 353 (360) Aden, the Andaman and Nicobar Islands, Ajmere and Marwara in Rajputana, are declared by Acts XIV and XV of 1874 to be parts of British India So also the Cantonment of Wadhwan in Kathiawar—*Triccampanachand v B B & C I Ry Co* 9 Bom 244 This Act does not apply to Laccadive Islands—*Ahmed Koya v Aisamma*, 49 Mad 419, 93 I C 341, A I R 1926 Mad. 657. Native States do not form part of British India and this Act is not intended to apply to them, although many of those States have adopted this Act

2. In this Act, unless there is anything repugnant
Definitions. in the subject or context,—

(1) "applicant" includes any person from or through whom an applicant derives his right to apply :

(2) "bill of exchange" includes a hundi and a cheque :

(3) "bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be :

(4) "defendant" includes any person from or through whom a defendant derives his liability to be sued :

(5) "easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, attached to, or subsisting upon, the land of another :

(6) "foreign country" means any country other than British India :

(7) "good faith"; nothing shall be deemed to be done in good faith which is not done with due care and attention :

(8) "plaintiff" includes any person from or through whom a plaintiff derives his right to sue :

(9) "promissory note" means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight :

(10) "suit" does not include an appeal or an application : and

(11) "trustee" does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title.

10A. 'Bond' :—The definition is the same as in Sec. 2 (5) (a) of the Indian Stamp Act II of 1899 Where 40 maunds of wheat were advanced to the defendants who agreed in writing to repay the same with interest in kind, *held* that the instrument was a *bond* within the meaning of this section, and not a mere agreement—*Wadhawa v. Karim Baksh*, 6 Lah 276, 86 I C 844, A.I.R. 1925 Lah. 415.

11. 'Defendant,' 'from or through' .—Adverse possession of a defendant may be added to the previous adverse possession of the widow by whom the defendant was adopted, as the defendant derived his liability to be sued from the widow and thus brought himself within the definition of a "defendant" as provided by this section—*Padajirav v Ramrav*, 13 Bom. 160 (165). So also, adverse possession by the defendant of the office of *archaka* may be supplemented by the previous adverse possession of his predecessor-in-office—*Krishnaswami v. Veeraswami*, 36 M L.J 93, 49 I.C. 393. Adverse possession of the defendant may be supplemented by the previous adverse possession of the judgment-debtor from whom the defendant purchased, and may be pleaded in a suit by the auction-purchaser under sec 331 of the C. P. C. of 1882 (rr. 99 and 103, Order XXI of the Code of 1908)—*Namdev v Ramchandra*, 18 Bom 37 (40). A son in a Mitakshara family acquires an interest by devolution, as soon as

he is born, in the property vested in his father and other members of the family, and thus he derives his liability to be sued from or through his father and those members and to be impleaded as a defendant in a suit against the family property—*Hari Prasad v. Sourendra*, 1 Pat. 506 (521), 3 P.L.T. 709, 66 I.C. 945, A.I.R. 1922 Pat. 450. A purchaser at an auction sale acquires the right, title and interest of the judgment-debtor, and in virtue of that, is put in possession, by reason of which he becomes liable to be sued by the true owner. He therefore derives such liability, within the contemplation of this section, from or through the judgment-debtor—*Ali Saheb v. Kaji Ahmad*, 16 Bom. 197 (199). A *char* which was found to be reformation *in situ* of the plaintiff's land was occupied for some years by Government. It was then claimed by the defendants as their property, and Government made over possession to them. On plaintiff's suing to recover possession, the defendants pleaded limitation and to make out their plea, claimed to tack on to their own occupation the period of Government's possession. *Held* that the defendants did not derive liability to be sued from or through the Government but on the other hand they had claimed against the Government and had recovered the land from the Government, they therefore could not tack the period of Government's possession to their own—*Basanta Kumar v. Secretary of State*, 44 Cal. 858 (874) (P.C.), 21 C.W.N. 612, 15 A.L.J. 398, 19 Bom. L.R. 480, 32 M.L.J. 505.

12. 'Easement'.—The definition of "easement" given in this section shall not apply to those places where the Easements Act applies, viz. Madras, C. P., Coorg, Bombay, U. P. and Oudh. See sec. 20, sub-section (4). In those places, the definition given in sec. 4 of the Easements Act will be adopted. See Note 227 under sec. 20.

13. Foreign Country.—The following places are outside British India—The territory of Mayurbhanj *Empress v. Keshub* 8 Cal. 985 (F.B.), the British Cantonment of Secunderabad *Hossain Ali v. Abid Ali*, 21 Cal. 177, the Tributary Mehals of Orissa *Ratan Mahanti v. Khatoor*, 29 Cal. 400; the Colony of Mauritius *Kasim v. Isuf*, 29 Cal. 509 (516); the Laccadive Islands—*Ahmed Koya v. Alcanuma* 40 Mad. 419, 93 I.C. 341, A.I.R. 1926 Mad. 657.

'Good faith'.—The definition is almost the same as that given in sec. 52 of the Indian Penal Code.

14. Plaintiff—'from or through'. A *stanom* according to the customary law of Malabar is descendible from one *stanom* holder to another in a peculiar line of succession, and each successive holder is in the same position as an ordinary heir succeeding on intestacy. *Stanom* holders, therefore, derive their title to sue from or through their immediate predecessors within the meaning of this clause. *Rajah of Palghat v. Ramanunni*, 41 Mad. 4 (10), 33 M.L.J. 26, 42 I.C. 22. But a *ghatual* does not 'claim through' a previous *ghatual* within the meaning of this clause, even though the latter may be the father of the former—*Prosanna v. Srikanth*, 40 Cal. 173 (180), 17 C.W.N. 139, 16 I.C. 305. A reversioner claiming an estate under the Hindu law does not claim from or through

the widow in whom the estate vested at the death of the last male holder—*Lambasiva v. Ragava*, 13 Mad. 512 (515). Therefore, adverse possession against the widow does not necessarily bar the reversioners. See this subject discussed under Article 141. An adopted son, who is adopted by a widow after the death of her husband, does not derive his right to sue from or through his adoptive mother—*Harek Chand v. Bejoy Chand*, 9 C.W.N. 795 (800). But see 13 Bom. 160 cited in Note 11 ante.

A trustee of an endowment derives his title from or through the trustee preceding him—*Gnanasambandha v. Velu Pandaram*, 23 Mad. 271 (280, 281) P.C. But one of several joint tenants does not claim from or through a deceased joint tenant, because where one of the joint tenants dies, no one claims anything under him, as there is no transmission of interest—*Richardson v. Young*, L.R. 6 Ch 478, cited in *Bhogilal v. Amrita Lal*, 17 Bom. 173 (178). And where there are several reversioners entitled successively under the Hindu Law to an estate held by a Hindu widow, no one of them claims through or derives his title from another, but each derives title from the last full owner—*Bhagawanta v. Sukhi*, 22 All. 33 (43) (F.B.). If therefore the right of the nearest reversioner to contest an alienation by the widow is allowed to be barred by limitation as against him, it will not bar the similar rights of the remoter reversioners. See notes under Article 125.

15. 'Promissory Note':—Compare the definition given in sec 4, Negotiable Instruments Act (XXVI of 1881): "A promissory note is an instrument in writing (not being a banknote or a currency note) containing an unconditional undertaking, signed by the maker to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

16. 'Suit':—A suit must begin with a plaint. Therefore a proceeding under sec. 244, C. P. Code, 1882 (sec. 47, C. P. Code, 1908) is not a suit—*Venkatachandrappa v. Venkatarama*, 22 Mad. 256 (258). The word 'suit' in this Act does not include an appeal or an application. Thus, it does not include an appeal in a divorce suit—*A. v. B.*, 22 Bom. 612. Nor does it include an application under sec. 214, Indian Companies Act—*Connell v. Himalaya Bank*, 18 All. 12 (15).

'Trustee':—See notes under sec. 10.

PART II.

LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

3. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit ^{Dismissal of suits, etc., instituted, etc., after period of limitation.} instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence.

Explanation :—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

16A. Special or local laws :—By section 29 (2), as amended by the Limitation Amendment Act of 1922, this section has been made applicable to special or local laws.

17. Government :—Even the Government is not entitled to an exemption from the provisions of the Limitations Act—*Appaya v Collector*, 4 Mad. 155 (156).

18. Custom :—No custom will be allowed to override the positive prescriptions of the Limitation Act—*Mohanlal v. Amrattal*, 3 Bom 174

19. Agreement of parties, waiver, etc :—The parties cannot by consent or agreement extend or alter the period of limitation—*Kristo Komul v. Huree Sirdar*, 13 W R 44 (F B); *Lalla Ram Sahoy v Dodraj*, 20 W R. 395, *Noban v Dhon Mahomed*, 5 Cal 820 (821), *Khetra Mohan v Mohim*, 18 I C 595 (596) (Cal), *Midnapur Zemindary Co v. Deputy Commissioner*, 3 P L J 132 136), 44 I C 370 Compare sec 28, Contract Act, which enacts "Every agreement . . which limit the time within which any party may enforce his rights is void to that extent." So also, the parties cannot waive the statute or contract themselves out of the law of limitation in this country. For, it is well settled that there can be no estoppel against an Act of the Legislature. An agreement by a person against whom a cause of action has arisen, that he would not take advantage of the law of limitation is ineffective—*Sitharama v. Krishnaswami*, 38 Mad 374 (381), 25 M L J 264, 21 I.C. 24. This section places it beyond the power of the Judge, as well as beyond the

power of the defendant, to ignore or waive the plea of limitation—*Mangu v. Kandhat*, 8 All. 475 (483); *Samuel v. Improvement Trust*, 26 O.C. 324, 73 I.C. 127; *Ramanatha v. Commissioner*, 6 Rang. 175, A.I.R. 1928 Rang 152 (153). A covenant not to raise the plea of limitation in case a suit has to be filed, is inoperative and invalid, since its effect is to defeat the provisions of this Act, and as such falls within section 23 of the Contract Act—*Ramamurthy v. Gopayya*, 40 Mad 701 (705). Such a covenant will not prevent the Court from interfering and dismissing the suit—*Chaturbhuj v. Muhammad Habib*, 54 I.C. 36 (38), (Pat.).

20. Consent of parties :—The consent of parties cannot give a Court jurisdiction to hear an appeal when the same has been presented beyond the time prescribed by the Limitation Act—*Debi v. Mulhu*, 1894 A.W.N. 19

21. Onus of proof :—This section compels the Court to dismiss the suit, if it is time-barred, although the defence of limitation has not been set up, and the plaintiff must show that his suit has been instituted within the period of limitation, or that there are circumstances which take his case out of the ordinary period of limitation—*Mahomed Arsad v. Eakoob*, 24 W.R. 181 (182). The plaintiff must on his own allegations be able to show that his suit is within time; he cannot be allowed to adopt any allegations of the defendant in order to show that his claim is not barred—*Mansa Ram v. Behari*, 6 P.R. 1912, 12 I.C. 453, 218 P.L.R. 1911. But if the plaintiff proves his case and the defendant sets up the defence of limitation, the defendant must plead it and show that the claim is barred—*Radha Prasad v. Bhajan*, 7 All. 677 (680). If the defendant asserts that a shorter period applies, then the burden lies on the defendant to prove the circumstances which bring the suit within the shorter period. See *Mohan Singh v. Henry Conder*, 7 Bom. 478 (480). If when the plaintiff proves his case (in a suit to recover money on a bond) it appears from the facts that the debt accrued at a date earlier than the period of limitation, and the defendant has set up the plea of limitation, in that case the defendant will be entitled to judgment—*Radha Prasad v. Bhajan*, (supra).

So also, this section compels the Appellate Court to dismiss a time-barred appeal although the respondent has not taken the objection; and it lies upon the appellant to prove affirmatively that the appeal has been presented in proper time—*Ramey v. Broughton*, 10 Cal 652 (658, 661)

22. Suit instituted :—A suit should be taken as instituted on the day on which the plaint is presented. It does not matter, if it be not accepted on that day; therefore where a plaint is presented within the period of limitation with insufficient Court-fee, and time is given by the Court to make good the deficiency, the suit is not barred by limitation if the deficiency is supplied within the period fixed by the Court, though after the limitation-period had expired. Under such circumstances, for the purposes of limitation, the date of presentation of the plaint and not the date on which the requisite Court-fees are subsequently put in, should

be deemed to be the date of institution of a suit—*Raj Kishori v Madan Mohan*, 31 Cal 75, *Surendra Kumar v. Kunja*, 27 Cal. 814 (818), *Hari Mohun v. Naimuddin*, 20 Cal 41, *Matl Sahu v Chhatridas*, 19 Cal. 780; *Dhondiram v. Taba*, 27 Bom. 330 (338); *Ram Dayal v Sher Singh*, 45 All. 518, 21 A.L.J. 387, 74 I C. 358, A I R. 1923 All. 538; *Gavaranga v Botokrishna*, 32 Mad. 305 F B. (overruling *Venkataramayya v. Krishnayya*, 20 Mad 319), *Assan v Pathumma*, 22 Mad. 494, *Valambal v. Vythilinga*, 25 Mad 380, *Hari v. Akbar*, 29 All 749 (F.B.); *Gaya Loan Office Ld. v. Awadh Behari*, 1 P L.J. 420, 37 I C. 507, *Tara Singh v. Muhammad*, 74 P.R. 1903; *Saif Ali v Fazul Mehdi*, 123 P.R 1907; *Jhanda Khan v. Bahadur Ali*, 3 P R. 1893

Compare sec. 149 of the C P. Code (1908) and sec 28 of the Court Fees Act

[But it has been held in certain other Allahabad cases that a suit can not be said to be instituted by the presentation of a plaint which bears insufficient Court-fee, and the date on which it is re-presented with proper stamps is the date of institution of the suit, therefore, if at the time when the deficiency in Court-fee stamps is made good the period of limitation has expired, the suit must be dismissed as barred—*Chatarpal v Jagram*, 27 All 411, *Ram Tahal v Dhubri*, 28 All. 310; *Durga v. Bisheshar*, 24 All 218, *Jainti v Bachu*, 15 All 65 (70) (F B) Even if the Judge fixes a time for the payment of the deficient Court-fee, it must be a time within the period of limitation—*Jainti v Bachu*, 15 All. 65 (F.B.), *Muhammad Ahmed v Muhammad Serajuddin*, 23 All 423 But these rulings have been disapproved of in 29 All. 749 (F B)]

Similarly, when a plaint is returned and ordered to be amended within a time fixed by the Court, it is the date of the original presentation of the plaint, and not the date of the subsequent presentation after amendment, which is taken to be the date of institution of the suit—*Patel Mafatlal v. Bai Parson*, 19 Bom 320 (323), *Sheo Partab v Sheo Gholam* 2 All 875, *Ram Lal v. Harrison*, 2 All 832, *Durgagir v Kollu*, 7 N L R 33, 10 I C. 731 (733) If the Court specifies a date for presentation of the plaint after amendment, and the amended plaint is presented within that date (even though it is a date beyond the period of limitation), the plaint is deemed as filed within time, the date of original presentation being the date material for the purpose But if the Court specifies a date for amendment which is beyond the period of limitation and the amended plaint is presented beyond that date, the date of subsequent presentation will be treated as the date of presentation, and the plaint will be deemed as filed out of time. It is a settled rule of law that the date of amendment is immaterial, unless indeed the time expressly allowed by the Court has been exceeded—*Durgagir v Kolla* (supra). A plaint may be amended after it has been registered, and it is competent for the Court to return the plaint for necessary amendment, even though at the time of such return the period of limitation for the suit may have expired—*Barakatunnissa v. Md. Asad Ali*, 17 All. 288.

If a plaint has been insufficiently stamped at its presentation, and the

deficiency is supplied after the expiration of the period of limitation, and *after expiry of the time fixed by the Court* for the supply of the deficient stamps, it will be liable to rejection and the suit will be considered as barred—*Brahmomoji v. Andi Si*, 27 Cal 376 (378)

Where a *wholly unstamped* (and not merely insufficiently stamped) plaint was filed on the last day of limitation and the Court accepted it and ordered the plaintiff to file stamps the next day, which the plaintiff did, *held* that the suit was time-barred, the plaint being considered as presented on the day on which the stamps were put in—*Partap Singh v. Kishan Dyal*, 130 P.R. 1890 Where a suit was by two plaintiffs, but the plaint being signed by one alone, it was returned for the signature of the other, and the same was re-presented after the period of limitation allowed for the suit, *held* that the suit was barred—*Vellappa v. Subramanian*, 26 M L J. 494, 23 I C 431 (433) Where a plaint presented within time was returned to the plaintiff after issue of summonses, the defendants not having been found, for being re-presented when the whereabouts of the defendants could be found, the suit would be in time, though when the plaint was re-presented the period of limitation had expired—*Torobaz v. Pir Bakhsh*, 22 P.R. 1887. Where a plaint presented in time to the proper Court was returned by that Court to be presented to the Court deputed to try the suit, and was re-presented to the Court deputed at a time when the period prescribed had already expired, the suit should not be dismissed The principle is that when a plaint is presented to the proper Court, which makes it over for disposal to a subordinate Court, the date of the suit is the date of original presentation, and the fact that the Court improperly returned the plaint to the plaintiff for presentation to the subordinate Court instead of itself forwarding it direct to such Court, does not affect the question of limitation—*Seth Thandi Ram v. Mahadia*, 7 P.R. 1895

Proper presentation.—The plaint must be presented to an officer authorised to receive it, otherwise there is no proper presentation and the suit is not 'instituted'—*Raj Chunder v. Googul Gope*, 18 W.R. 172. Thus, where a plaint was presented to a *karkun* left in charge of the Court during vacation, it was held that such presentation was invalid—*Nandavallabh v. Allubhai*, 6 B H C R A.C. 254. A despatch *by post* is not presentation to the proper officer of the Court, but if such a plaint is accepted and the party afterwards appears and takes out the necessary processes under the Court's orders, within the period of limitation, it may be held that the institution was not bad—*Sankaranarayana v. Kunjappa*, 8 Mad. 411 (413).

Suit against minor.—A suit against a minor defendant is instituted when the plaint is filed, not when a guardian *ad litem* for him is appointed—*Khem Karan v. Har Dayal*, 4 All. 37; *Imaml v. Saddan*, 18 P.R. 1901.

23. Appeal preferred.—In cases of appeals too, a conflict of opinion exists as to whether an appeal should be treated as preferred on the day on which it is first presented, or on the subsequent date on which it is presented after putting in of proper stamps. According to

some cases, the date of the original presentation of the memorandum of appeal, and not the date on which it is re-presented after supply of deficit stamps, is deemed to be the date of filing of the appeal—*Patcha Saheb v Sub-Collector*, 15 Mad. 78, see also *Chennappa v. Raghunath*, 15 Mad. 29; while in *Yakubunnissa v. Kishori Mohan*, 19 Cal 747, and *Balkaran v Gobind*, 12 All 129 (142) (F.B.) it has been held that a memorandum of appeal not properly stamped when presented cannot be treated as properly presented, and the subsequent presentation after supply of proper stamps beyond the period of limitation is ineffectual. The Patna High Court likewise holds that if an appellant deliberately without any excusable ground and to suit his own convenience pays on his appeal insufficient Court-fee, the Court is not bound to accept the appeal and give the appellant time to make good the deficiency—*Ram Sahay v Lachmi Narayan*, 3 P.L.J. 74, 42 I.C. 675

Where an appellant presented a memorandum of appeal within the period of limitation, but the Appellate Court returned it for correction, without specifying any date for such correction, and it was afterwards presented after amendment at a time when the period of limitation had expired, held that the appeal should be taken as preferred on the date of the first presentation (and not the subsequent presentation after amendment) of the memorandum of appeal, and was in time—*Jagannath v Lalman*, 1 All. 260

Proper presentation of appeal —An appeal is said to be 'preferred' when it is presented in accordance with sec. 541 of the C. P. Code 1882 (O. XLI, r 1 of the Code of 1908) i.e., by a proper person to the proper Court—*Akshoy Kumar v. Chunder Mohun*, 16 Cal 250 (251). Presentation of an appeal without a copy of the decree appealed from is not a proper filing of the appeal—*Masum v Madan*, 9 I.C. 222, 1911 P.W.R. 8, *Balkaran v. Gobind Nath*, 12 All 129 (139) (F.B.), *Chamila v Amir Khan*, 16 All. 77 (78), *Akbar Ali v Ram Chand*, 53 P.R. 1887, *Nihal v. Iswar*, 147 P.R. 1879, C. v. C, 22 P.R. 1903, *Bhag Singh v Jhanda Singh*, 7 P.R. 1879. But a copy of the decree of the first Court is not required to be filed with the memorandum of a second appeal—*Pirathi v Venkataramanayyan*, 4 Mad 419 (F.B.); *Chunilal v. Dahyabhai*, 32 Bom. 14 (F.B.) If a memorandum of appeal is presented to the District Judge at his house after Court hours, on the last day of limitation, the Judge has jurisdiction to accept it, although he is not bound to do so—*Thakur Din Ram v Hari Das*, 34 All 482 (F.B.).

Appeal by prisoner —Under the provisions of sec. 420 Cr P Code, presentation of the petition of appeal by a prisoner in jail to the officer in charge of the jail is equivalent to presentation to the Court—*Queen v Lingaya*, 9 Mad 258 (259)

24. "Application made" —For the purposes of limitation, applications may be made at any time in the day, notwithstanding the rules of the Court prescribing certain hours for the receipt of petitions and hearing of motions—*Desputty v. Doolar Roy*, 1 C.L.R. 291. An application made to the High Court (original side) of Bombay is deemed

to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court and not when the motion is made—*Venkapaya v. Nazerally*, 47 Bom 764 (772).

When an application for execution is defective in certain particulars, and a supplemental application furnishing such particulars is put in, the two may be considered as one application put in on the date of the first—*MacGregor v. Tarini Churn*, 14 Cal 124 (127). If an application presented within time is returned by the Court for amendment, and is re-presented after amendment after the period of limitation, the amendment relates back to the original presentation—*Shama Prasad v. Taki Mullik*, 5 C.W.N 816 (817). But it has been held by the Allahabad High Court that an *insufficiently stamped* application for review will be considered as made, for the purposes of limitation, only on the day the deficiency in stamp is supplied—*Munro v. Cawnpore Municipal Board*, 12 All. 57. Compare the cases cited at p. 15 *ante* as regards insufficiently stamped *plaints*.

The application must be made to the *proper* officer, otherwise there is no proper making of application. The presentation of an application for review to the *Munsarim* of the District Court instead of to the Judge was held to be improper—*Munro v. Cawnpore Municipal Board*, 12 All. 57.

25. "Shall be dismissed" :—"Reasons of public policy having dictated the enactment of the Law of Limitation, the Indian Legislature has expressly declared that, whether the defence of limitation be pleaded or not, the Courts whether of first instance or of appeal are bound to give effect to such law. The bar of limitation cannot be waived, and suits and other proceedings must be dismissed if brought after the prescribed periods of limitation."—U. N. Mitra's *Limitation* (5th Edn.), p. 38. Sec. 3 requires that every suit or application made after the period prescribed therefor shall be dismissed, although limitation has not been set up as a defence. An obligation is thus cast upon the Court to dismiss a suit or application, if it is barred by limitation—*Asutosh v. Upendra*, 21 C.W.N. 564 (569). It has been held in a Madras case that the obligation cast upon a Court to dismiss a suit exists only in cases where it is in a position to dismiss the *whole* suit. It does not exist, where the plaintiff's claim is partially admitted by the defendant—*Kandasamy v. Annamalai*, 28 Mad. 67 (68, 69). But the correctness of this decision may be doubted. If the portion of the claim before the Appellate Court is barred by limitation, may not the Court dismiss that portion?

The obligation to dismiss a time-barred suit or appeal rests upon the Court before which the suit is instituted or appeal is preferred, but is not laid on each successive Court whenever the objection comes to view. That is, an appellate Court is bound to consider whether the appeal before it is time-barred, but not whether the suit as instituted before the Court of first instance was time-barred or not. Similarly, a second Appellate Court is bound to consider whether the second appeal before

it is time-barred, but not whether the suit in the Court of first instance was barred, or whether the appeal before the lower appellate Court was so barred—*Dattu v. Kasai*, 8 Bom. 535 (537), *Ahmad Ali v. Waris*, 15 All 123 (126)

Time-barred appeal presented before wrong Court—Where an appeal is filed in the wrong Court and is out of time, the Court is entitled to dismiss it, and not to return it for presentation to the proper Court in order that the latter may consider the question as to whether the time can be extended under section 5—*Charandas v. Amirkhan*, 48 Cal. 110 (117, 118) (P.C.), 25 C.W.N. 289, 57 I.C. 606.

25A. Admitting time-barred appeal subject to objections—The practice of admitting a time-barred appeal "subject to objections at the hearing" has been condemned by the Privy Council in *Krishnasami v. Ramasami*, 41 Mad. 412, 22 C.W.N. 481, 20 Bom. L.R. 541 and should therefore cease. See also *Talendrajit v. Gunendrajit*, 31 C.L.J. 1, *Abdul Kassem v. Chaturbhuj*, 6 P.L.J. 444, *Chaturbhuj v. Muhammad Habib*, 54 I.C. 36 (38) (Pat). In the above Privy Council case as well as in *Shrimant Sundarabai v. Collector*, 43 Bom. 376 (P.C.) their Lordships of the Judicial Committee impressed on the Courts in India the urgent expediency of adopting a procedure which should secure at the stage of admission the final determination (after due notice to all parties) of any question of limitation affecting the competency of an appeal. See also Note 70 under section 5.

26. Limitation not pleaded as defence :—The provisions of this section are mandatory and a Court is bound to take notice of a question of limitation not specifically raised in the written statement, if on the facts in the plaint and those found, it patently appears that the suit is barred—*Rhodes v. Padmanabha*, 17 M.L.T. 18, 26 I.C. 369, *Vishweswar v. Sadashiv*, 27 Bom. L.R. 1456, 93 I.C. 930, A.I.R. 1926 Bom. 54. Even the fact that the defendant has abandoned the plea of limitation in the lower Court does not relieve the Appellate Court of the duty of taking notice of the point of limitation *suo motu*—*Nehal Devi v. Kishore Chand*, 97 P.R. 1910, 8 I.C. 999. But where the suit is not on the face of it obviously barred by limitation, the Appellate Court does not exercise a wise discretion in taking up the question of limitation on its own initiative—*Mg Yan v. Mg Po Ka*, 3 Rang. 60, 89 I.C. 56. Though the question of limitation was never raised in either of the lower Courts, nor raised in the memorandum presented to the High Court in second appeal, the High Court can nevertheless dismiss the suit if it is time-barred on the face of the pleading in accordance with the mandatory provisions of this section, provided that the other party is given adequate opportunity to be heard on the suit—*Balaram v. Mangta*, 34 Cal. 941 (945, 951) (S.B.).

But, in spite of the provisions of this section, it is advisable for the defendant to plead limitation, if the suit is instituted after the prescribed period. If the defence of limitation rests upon a disputed question

of fact, and the defendant does not raise the plea in his written statement nor does the point of limitation arise upon the evidence, the Court may refuse to frame an issue on that point at the hearing—*Venkata Narasinha v. Bhashyakarla*, 25 Mad. 367 (370, 378) (P.C.).

27. Plea when can be taken:—In the Original Court, if the plea of limitation is taken before the issues are fixed, it must, of course, be entertained and decided. If it is taken by the defendant at a later stage and can be decided on the existing issues and on the record as it stands there, the Court is bound to take note of it and decide it. This rule holds good whether the plea has been actually taken or not, if the matter has in any way come to the notice of the Court. But if, after the issues in the case have been fixed and the case has proceeded to some length, the defendant raises the question of limitation, and the Court finds that in order to decide that question, fresh issues of fact have to be gone into and additional evidence taken, then the Court has the option of refusing to entertain the plea. When a case has passed out of the Court of first instance and is before a Court of appeal, the rule remains the same; and an appellate Court is justified in refusing to entertain a plea of limitation which was not taken in the first Court nor in the grounds of appeal in the Appellate Court but is urged for the first time in argument in the latter Court, where the plea for its proper decision involves further inquiry into facts—*Shah Muhammad v. Piara*, 84 P.R. 1911, 13 I.C. 792. If the defendant deliberately abandons the plea of limitation in the Court of first instance, he cannot be allowed to raise the question in appeal, if the facts found do not enable the Appellate Court to decide it and new findings would have to be obtained—*Seshachala v. Varada*, 25 Mad 55 (60); *Rangayya v. Narasimha*, 19 Mad 416 (419). But if the point of limitation arises upon the facts of the case, or is obvious on the record, and does not stand in need of being developed by evidence, it must be heard and determined by the Appellate Court, though it does not appear on the pleadings or in the grounds of appeal or appears for the first time in the memorandum of appeal—*Deo Narain v. Webb*, 28 Cal. 86; *Harak Chand v. Deonath*, 25 Cal. 409 (410); *Bechi v. Ashanullah*, 12 All 461 (F.B.); *Nadhu Mandal v. Kartik Mandal*, 9 C.W.N. 56 (58); *Raghunath v. Pareshram*, 9 Cal. 635; *Gulabmal v. Shujawal*, 259 P.L.R. 1914, 25 I.C. 354 (355); *Ganeshdas v. Nimbi*, 8 N.L.R. 174, 17 I.C. 638; *Dulo v. Md. Nathu*, 27 P.L.R. 870, A.I.R. 1926 Lah. 451, 94 I.C. 251. But it should be noted that if the plea of limitation is not taken in the grounds of appeal, the party urging it cannot argue it except on obtaining the permission of the Court under sec. 542, C. P. Code, 1882 (O XLI, r. 2 of the Code of 1908)—*Balaram v. Mangta*, 34 Cal. 941 (945) (S.B.); *Ahmad Ali v. Waris*, 15 All. 123 (127) (F.B.); and the Appellate Court should not refuse to grant the permission where the point arises on the face of the plaint and no question of fact has to be enquired into to enable the Court to dispose of it—*Balaram v. Mangta*, 34 Cal. 941 (945, 948) (S.B.).

Where the defendant makes a general plea of limitation (*viz.* that the suit is barred by the 12 years' rule), the Appellate Court is not competent to dismiss the suit on the special plea that the suit is barred under Art. 3, Sch. III of the Bengal Tenancy Act, when such latter plea is raised for the first time in the Court of Appeal, without raising an issue in the lower Court and allowing the plaintiff to adduce evidence on it—*Kedar Nath v. Mohesh Chandra*, 28 C.L.J. 216, 46 I.C. 787.

Where a respondent fails to object to the admission of a time-barred appeal by the lower Appellate Court, the High Court in second appeal is not precluded from considering the question of limitation—*Chaturbhuj v. Md Habib*, 54 I.C. 36 (38) (Pat). Where a plea of limitation was not taken in either of the Courts below, it cannot be entertained for the first time in second appeal where such entertainment would involve the taking of additional evidence—*Atmaram v. Sardar Kuar*, 1884 A.W.N. 327; *Pirsab v. Gurappa*, 38 Bom 227, 16 Bom L.R. 111, 24 I.C. 716, or where the determination of the question would involve a fresh investigation of facts—*Bhadai v. Manohar*, 4 P.L.J. 645, 52 I.C. 125; *Shivappa v. Dod Nagaya*, 11 Bom 114, *Khush Lal v. Jugdish Pershad*, 1 Pat 23, 3 P.L.T. 795, A.I.R. 1922 Pat. 398, 69 I.C. 185. Even though the question of limitation was not raised in either of the Courts below nor raised in the memorandum of second appeal to the High Court, that Court will allow it to be taken in second appeal if the question of limitation arises on the face of the pleadings, and the whole case is properly before the Court—*Balaram v. Mangta*, 34 Cal 941 (950) (S.B.), *Rangacharya v. Ramanacharya*, 27 A.L.J. 229, A.I.R. 1928 All 689. The plea can be raised for the first time in second appeal, only if it is certain that its legitimacy can be determined on the pleading and does not depend upon any question of fact regarding which the other party might have adduced evidence—*Peruma v. Rama*, 28 M.L.J. 115, 28 I.C. 378 (379); see also *Narasingha v. Pralhadman*, 46 Cal 455, 22 C.W.N. 994, 47 I.C. 25. But in *Dattu v. Kasai*, 8 Bom 535 (537) the second Appellate Court refused to entertain the plea of limitation raised for the first time in second appeal (even though the point appeared on the face of the plaint), on the ground that as the defendant had failed to avail himself of the opportunity of urging his objections before the Courts below, he must be considered to have waived his right to raise the objection. The Allahabad High Court holds that a second Appellate Court cannot entertain the plea that the first appeal to the lower Appellate Court was time-barred when it was presented, if the plea has not been set forth in the memorandum of second appeal—*Ahmed Ali v. Waris*, 15 All. 123 (128) (F.B.), *Ram Kishen v. Difa*, 13 All 580.

A point of limitation cannot be raised for the first time in the High Court in revision, when it involves a mixed question of law and fact—*Natesan v. Ramachandra* 27 M.L.J. 728, 27 I.C. 116.

A plea of limitation as regards an application for execution can be taken at any time during the pendency of the execution proceedings, thus, so long as an application for execution is pending, the judgment-debtor can at any time show that the application is barred, and the Court has no

option but to dismiss it under this section. It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment-debtor is not allowed to take an objection on the score of limitation in a subsequent execution of the decree—*Kesho Prasad v. Harbans Lal*, 2 P.L.T. 22, 53 I.C. 85 (89); *Atul Krishna v. Brindaban*, 9 Pat. 306, A.I.R. 1930 Pat. 330 (331). An objection as to limitation may be taken at any stage of the execution proceedings, if the facts upon which the objection is based are patent upon the face of the record—*Gunjra Koer v. Lakhan Koer*, 35 I.C. 337 (339) (Patna).

A plea of limitation can be taken even though the defendants have on a previous occasion acknowledged their liability. Thus, in a suit for money, although it appeared that in a previous suit the defendants had admitted their liability with regard to certain instalments which were then time-barred and had stated that they were always ready and willing to pay, still they were not precluded on any principle of estoppel from setting up the statute of limitation in the present suit—*Sitharama v. Krishnasamy*, 38 Mad. 374 (380).

28. Interference by High Court :—Where the lower Court allows an application which was clearly time-barred, without at all applying its mind to the question of limitation in the case, the lower Court acts without jurisdiction and the High Court has the right to interfere in revision under sec. 115 C. P. Code—*Piroj Shah v. Qarib Shah*, 7 Lah. 161, 95 I.C. 124, A.I.R. 1926 Lah. 379; *Kaliyaparama v. Chetty Firm*, 9 L.B.R. 71, 39 I.C. 154, *Asanand v. Jhangi*, 50 I.C. 610, 1919 P.L.R. 29; *Panchu Mandal v. Isaf*, 17 C.W.N. 667 (668), 18 I.C. 391.

29. Suit by a pauper :—Where during the pendency of an application for pauperism and before it is accepted or rejected by the Court, the applicant, upon an objection by the defendant, pays into Court the necessary Court-fee, the date of the application, and not the date of such payment, is the date of institution of the suit, and limitation for the suit runs against him only up to the former date—*Skinner v. Orde*, 2 All. 241 (P.C.); *Janakdhary v. Janaki*, 28 Cal. 427 (431) (dissenting from 18 All. 206), *Alayakammal v. Subraya*, 28 Mad. 493; *Raja Ram v. Tilok Chand*, 59 P.R. 1903. The Allahabad High Court is, however, of opinion that the latter date must be taken as the date of institution of the plaint—*Abbasi Begum v. Nanhi*, 18 All. 206 (209). The explanation to sec. 3 applies when the application for leave to sue as a pauper is granted by the Court. If the application for leave to sue as a pauper is rejected by the Court, and the applicant takes time for payment of Court-fees, but makes the payment after limitation of the suit has run out, though within the time granted by the Court, the suit will be taken as instituted not on the day of the application for pauperism, but on the day of the payment of Court-fees, and therefore barred—*Keshav Ram Chandra v. Krishna Rao*, 20 Bom. 508 (510); *Keshav Lal v. Mayabhai*, 9 Bom. L.R. 204; *Abhoya v. Bissesswari*, 24 Cal. 889 (891); *Naraini*

v. *Makhan*, 17 All. 526 (528). The principle is this : when the application for leave to sue *in forma pauperis* is *rejected*, the suit cannot be continued as of its original institution. When such an order of rejection is made, there is a bar to any further application to sue as a pauper, but the plaintiff, having first paid the costs, if any, incurred by the Government in opposing his application for leave to sue as a pauper, is allowed the liberty of instituting a suit in the ordinary manner in respect of such right as he may have (O 33, r. 15, C P. Code) Upon an order of rejection of an application for leave to sue as a pauper, the original proceedings come to an end, and if the applicant wishes to proceed within the vindication of his rights, he must sue in the ordinary course, and the date of the institution of that suit would not be the date of presentation of the application for leave to sue as a pauper, but would be the date on which the suit actually instituted on proper Court-fee—*Naraini v Makhan*, (supra)

Appeal by pauper :—If an application for leave to appeal as a pauper is rejected, and the applicant afterwards files an appeal in the regular way, at a time when the period of limitation for filing the appeal has expired, the date of the appeal is the date of filing the regularly stamped memorandum of appeal and cannot relate back to the date of filing the application for leave to appeal. The appeal is therefore barred—*Bishnath v Jagannath*, 13 All. 305 (308). But if at the time of dismissing the petition for leave to appeal as a pauper, the Court *grants time* to the appellant to file a regular appeal and such time happens to be beyond the period of limitation prescribed for the appeal, it is an exercise by the Court of a discretion vested in it under section 5. Therefore the appeal filed within the time granted would not be barred by limitation—*Guruar v Lakshmi* 26 All 329, see also the cases cited in Note 55 under sec. 5.

30. No limitation to acts of Court suo motu—This section is confined only to litigants and is inapplicable to acts which the Court may or has to perform *suo motu*. Such acts are not subject to any rule of limitation. Thus, section 206 of the C P Code 1882 (section 152 of the C. P. Code of 1908) empowers a Court of its own motion to amend its decree by correcting arithmetical errors, and the Court has power to do so at any time, irrespective of the fact that an application by the party asking the Court to exercise that power may be barred at the time—*Dhan Singh v Basant Singh* 8 All 519 (533). *Raghunath v Rajkumar*, 7 All 276 (280).

4. Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

Where Court is closed when period expires.

31. General principle :—The general principle of law is this : when a party is prevented from doing a thing in Court on a particular day, by the act of the Court itself, as for instance, on account of the closing of the Court, and not by any act of his own, he is entitled to do it at the first subsequent opportunity—*Peary Mohun v. Anunda Charan*, 18 Cal 631; *Shoostee Bhusan v. Gobind Chunder*, 18 Cal. 231, *Dharamsi Morarji Chemical Co. v. Ochhavilal*, 51 Bom. 848, A.I.R. 1927 Bom. 480; *Haji Ismail v. Trustees*, 23 Mad. 389 (397); *Aravamudu v. Samiyappa*, 21 Mad. 385; *Sambasivachari v. Ramasami*, 22 Mad. 179, *Surendra v. Souravini*, 10 C.W.N 535; *Subrahmanian v. Krishna Aiyar*, 26 M.L.J. 307, 23 I.C. 23, *Waterton v. Baker*, L.R. 3 Q.B. 173; *Mayer v. Harding*, L.R. 2 Q.B. 410 Compare section 10 of the General Clauses Act which lays down that “where any act or proceeding is directed or allowed to be done or taken in Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or on the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time, if it is done or taken on the next day afterwards, on which the Court or office is open.”

And so, where the decree in a pre-emption suit directs that the purchase money should be paid into Court within a fixed time after the decree becomes final, the decree becomes final when the period prescribed for appeal expires, and if the period of limitation prescribed for an appeal from the decree expires on a holiday, the decree becomes final on the day the Court reopens—*Ram Sahai v. Gaya*, 7 All. 107 (108). The period of limitation for setting aside an auction sale under O. 21, r. 89, C. P. Code by depositing the amount in Court expired during the vacation, and the application together with a tender of the amount due was presented by the judgment-debtor on the re-opening day, but as the tender was not signed by the Judge on that day, the actual payment could not be made on that date but was made on the next day. *Held*, that the tender was in time, as the delay in payment was not due to any fault of the judgment-debtor—*Durga Prasad v. Babu Lal*, 20 A.L.J. 543, A.I.R. 1922 All 195 (196), 67 I.C. 321. Similarly, where the applicant preferred his application for setting aside a sale under O 21, r. 89 together with the deposit money on the last day of limitation, but he was eventually told that his application could not be received as the Judge was busy, and that the money should be deposited the next day, *held*, that although sec. 4 of this Act did not apply (as the Court was not closed), still the principle of this section applied, as the applicant was refused facilities to carry out his act on the day in question, and the application and deposit made on the next day was not barred—*Ruotmal v. Amarsingh*, 9 N.L.J. 57, A.I.R. 1926 Nag 331, 96 I.C. 376

This section does not extend the period of limitation for preferring a suit or appeal but simply says that the days during which the Court is closed are treated as non-existent or *dies non*—*Girija Nath v. Patani Bibee*, 17 Cal 263 (266).

32. Application of this section to special or local laws :

This section applies although the case is governed by special or local laws. See section 29 (2) (a) (as now amended by the Limitation Amendment Act X of 1922) by which the provisions of section 4 have been made expressly applicable "for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law." Even before the Amendment Act was passed, it was laid down in numerous cases that the general provisions of this section (as well as the next section) should apply to a special or local law—*Kullayappa v. Lakshminpathi*, 12 Mad 467; *Nizabatulla v. Wazir*, 8 Cal. 910; *Behary v Mongola*, 5 Cal 110, *Waryam v Wadhava*, 89 P.R. 1918, 46 I.C. 588, *Subbarayan v Natarajan*, 45 Mad 785 (per Ramesam J).

Thus, if the Court be closed on or before the last day of the period limited, the judgment-debtor may pay the sum of money into Court under sec 174 of the Bengal Tenancy Act to set aside the sale, on the first day the Court re-opens, notwithstanding the absence of express provision to that effect—*Shooshee v. Gobind*, 18 Cal. 231. Similarly, if the last day for a suit under sec. 77 of the Registration Act expires on a holiday, a suit instituted on the next re-opening day is not time-barred—*Ahad v. Bahar Ali*, 16 C.W.N. 721, 14 I.C. 173, *Matabbar v. Shashi*, 16 C.W.N. 20, 12 I.C. 33. So also, an application under sec. 22 of the Provincial Insolvency Act (1907) may be made on the re-opening day, if the 21 days from the decision complained of expire on a holiday—*Bhairon Prosad v. Dass*, 17 A.L.J. 787, 51 I.C. 813. Similarly, where the last day for filing a suit under sec 87 of Madras Harbour Trust Act (II of 1886) was a holiday, the suit could be filed on the next opening day—*Haji Ismail v Trustee of the Harbour Madras*, 23 Mad 389. Where the period of limitation for an appeal under section 119A of the Oudh Rent Act expired on a holiday, and the appeal was filed on the day following, held that the appeal was filed within time—*Binda Pershad v Ram Bhajan*, 17 O.C. 254, 25 I.C. 703.

In some cases, a distinction was drawn between an Act which is a complete Code in itself, and an Act which is not so, and it was laid down that "the general provisions of the Limitation Act (secs 4 to 25) are applicable to proceedings under special or local laws unless the special or local law is a complete Code in itself to which the provisions of the Limitation Act cannot be applied without incongruity." Thus the N.W.P. Rent Act is not a complete Code in itself and is particularly incomplete as regards provisions regarding limitation, consequently there is nothing to exclude the application of sec 4 of the Limitation Act to the Rent Act—*Bani Prosad v Dharaka* 23 All 277. But the Oudh Rent Act is a complete Code in itself containing rules of limitation complete in themselves and is not affected by the general provisions of the Limitation Act—*Raghubar v. Sheo Charan*, 4 O.C. 182. So also the Bengal Rent Act VII of 1869 being a complete Code as regards limitation, the provisions of section 4 of the Limitation Act did not apply, and if the last day for a

suit for rent under the Rent Act was a holiday, a plaint filed on the following day was barred—*Purran Chunder v Mutty Lall*, 4 Cal. 50. The Registration Act being a complete Code in itself, the provisions of the Limitation Act did not apply to a suit instituted under sec. 77 of that Act—*Appa Rau v. Krishnamurthi*, 20 Mad 249; *Veeramma v Abbiah*, 18 Mad. 99. *Subrahmanian v Krishna Aiyar*, 26 M L J 307, 23 I C 23. The Letters Patent (Lahore) together with the rules framed thereunder as to limitation for filing appeals are a complete Code in themselves and therefore the general provisions of the Limitation Act did not apply to appeals filed under sec 10 of the Letters Patent—*Dial Singh v. Buddha Singh*, 2 Lah. 127, 61 I C 327; *Fateh Mahomed v. Chothu Ram*, 3 Lah L J 361, 60 I C 737. See also *Deoki Lal v. Ramanand Lal*, 5 P L J 701, 59 I C 179 (cited under Sec 12)

This distinction will no longer hold good, by reason of the express provisions of section 29 as now amended, and section 4 will apply to all special or local laws, whether they are complete Codes or not.

33. Applicability of section to private agreements :

—Section 4 applies where a certain period has been prescribed by a statute, and has no application to a case where a certain date has been fixed for payment by agreement of parties. Thus, after a sale in execution of a decree, the decree-holder agreed to have the sale set aside on receipt of the decretal amount within two months from the date of sale. The last day of the two months being a holiday, the judgment-debtor deposited the decretal amount in Court on the re-opening of the Court. Held that the decretal amount not having been paid to the decree-holder within 2 months from the date of sale, the sale could not be set aside, and the fact that the Court was closed when the two months expired would not entitle the judgment-debtor to get the benefit of section 4 and to deposit the money on the re-opening day—*Adya Singh v. Nasib Singh*, 1 P.L.T. 227, 56 I C. 495 (496). But in a Nagpur case, where the last day of payment of the money under a compromise decree was a holiday, and the Appellant deposited the money in Court on the day the Court re-opened, held that there was a valid compliance with the decree. The reason is that where the decree directs payment to the decree-holder, payment into Court is a valid compliance with the decree unless the Court directs that payment should be to the decreeholder and not otherwise—*Dhanu v. Kesho Prasad*, 19 N.L.R. 116, A.I.R. 1923 Nag. 246, 72 I.C. 388.

34. Period of grace :—The expression "period of limitation prescribed" means not only the period prescribed by the first Schedule but also includes the period of grace allowed by section 31. If the period of grace expires on a Sunday, a suit instituted on Monday would be in time—*Murugesu v. Ramaswamy*, 26 M L J 23, 21 I C. 770 (771); *Hira v. Amarti*, 34 All. 375 (379). *Contra—Sheodas v. Narayan*, 36 Bom. 269 (271), 12 I C. 811, where it has been held that sec. 4 does not apply to the period of two years' grace specified in section 31. In the Allahabad case cited above (34 All. 375, at p 390) Chamber J. has,

held that even though the day on which the period of grace expired would not be deducted under sec. 4 of the Limitation Act, it would be excluded under the provisions of sec. 10 of the General Clauses Act. This view has been followed by the Oudh Court in *Rahmatul v. Ashraf Ali* 15 O.C. 373, 15 I.C. 439 (441). The same view was taken in a Nagpur case—*Balkrishna v. Tima*, 7 N.L.R. 176, 12 I.C. 810 (811). In the Bombay case the Judges refused to apply sec. 10 of the General Clauses Act.

35. Court closed :—This section will apply even if the office of the Court is working in the vacation for urgent work. Thus, if the Prothonotary's office be open for the receipt of urgent work in the vacation, a plaint may be filed on the opening day of the term, because the receipt of a plaint is not an urgent work—*Ranchordas v. Pestonji*, 9 Bom. L.R. 1329. A Court is said to be closed even though the Judge holds Court on a Gazetted holiday—*Boyamma v. Balajee*, 20 Mad. 469 (470), *Kaliyanasundrappa v. Chinnasami*, 17 L.W. 413, A.I.R. 1923 Mad. 489, 72 I.C. 13; (but see 1886 P.J. 262 below); or if the Court is closed in an unauthorized manner—*Bishen Perkash v. Babooa Misser*, 8 W.R. 73.

Though the Court offices may be actually open during the vacation for other work, if there is no one lawfully required to be present for the purpose of receiving a plaint or a petition of appeal or application, the Court will be held to be closed for the purposes of this section. See *Nandavallabh v. Alubhai*, 6 B.H.C.R. 254. But if the offices of the Court are open during the holidays and there is also a Judge or clerk of the Court at hand for the purpose of attending to plaints, appeals and applications, the Court cannot be said to be closed within the meaning of this section, and all plaints, appeals and applications which are about to be barred during the vacation should be presented before the period of limitation actually expires. If they are not presented till the Court fully reopens after the vacation, it cannot be said that the Court was closed at the time they ought to have been presented in the ordinary course of things—*Shivram v. Bhavanaia*, (1886) P.J. 262, *British India Steam Navigation Co. v. Sharafally*, 46 Mad. 938; *Dharamsi Morarji Chemical Co. v. Ochhavlat*, 51 Bom. 848, 103 I.C. 540, A.I.R. 1927 Bom. 480. Where the Court adjourned for two months, but opened twice a week for one hour only, for the reception of plaints, petitions, etc., the Court was not closed within the meaning of this section so as to entitle the appellant to present his appeal on the first day the Court sat after the adjournment—*Nachiyappa v. Ayyasami*, 5 Mad. 189 (F.B.). A Court cannot be regarded as closed on dates when arrangements are made and notified for the reception of plaints—*Parvatheesam v. Bapanna*, 13 Mad. 447 (at p. 451). If, however, the Court office is open during the vacation and there is some one present who is entitled to receive the plaint, but there is no one who can decide that it shall be admitted and put on the files of the Court, the plaint is in time if presented on the first day on which there is such last mentioned officer present—*Ganpat v. Hirat*, 29 P.R. 1891.

A Court is not said to be closed, if the presiding officer is on tour. The plaint, in such cases, is to be presented to such officer in his camp—*Receiver v. Surapparazu*, 38 Mad. 295 (F B), 29 I C 449

36. Re-opening of Court—Where the Court, instead of re-opening on the day that it should have re-opened, re-opened on a later day under an authorised order of a higher Court, a plaint presented on the latter date was within time—*Bishan v Ahmad*, 1 All 263.

37. Closing of wrong Court.—The period during which the Court in which a suit was wrongly instituted was closed, will not be excluded. Thus, where a suit was filed in the Munsif's Court on the day on which the Court re-opened after the vacation, but the Munsif found he had no jurisdiction, and on the same day the suit was filed in the Small Cause Court, *held*, that the plaintiff could not claim the benefit of this section so as to exclude the time during which the Munsif's Court was closed, because the suit was not instituted in the Small Cause Court on the day on which that Court re-opened—*Abhaya v. Gaur*, 24 W R 26 Similarly, a suit was filed in the Sub-Judge's Court at Agra on June 2, 1913 Limitation expired on June 1, which was a holiday. The Agra Court held that it had no jurisdiction and on January 21, 1914 returned the plaint to be presented to the Court of the Sub-Judge at Aligarh It was so presented on January 22 *Held*, that the suit was barred, for though the plaintiff might be entitled under sec. 14 to deduct the time during which the suit was pending in the wrong Court, he was not entitled to the exclusion of the extra-day, viz June 1, on which the wrong Court was closed—*Makund v Ramraj*, 14 A.L.J. 310, 35 I.C. 292, *Maqbul v. Pateshri*, 27 A.L.J 976, A.I.R. 1929 All. 677; *Ramalinga v. Subba Iyer*, 24 M L T. 214, 47 I C 624, *Mohideen v. Nallaperumal*, 36 Mad 131, 12 I.C. 58, *Dharman v Gangs Ram*, 11 Lah 12, A.I.R. 1929 Lah 425, *Ummathu v. Pathumma* 44 Mad. 817. *Contra*—*Basvanappa v. Krishnadas*, 45 Bom. 443 See this subject discussed in Note 155.

38. Acknowledgment during holidays—As to whether an acknowledgment given after the period of limitation but during the vacation of the Court can save limitation, see Note 176 under sec. 19

39. Assignment of debt during holidays :—When the period prescribed for a suit to recover a debt expires during the Court vacation, and, before re-opening, the debt is assigned, the suit brought by the assignee on the re-opening day is within time—*Visram v. Tabaji*, 15 Bom. L.R. 348, 19 I C. 820 (821).

40. Pleading :—When the period of limitation for a suit expires on a Gazetted holiday, and the plaint is presented on the day the Court re-opens, it is not necessary for the plaintiff to state explicitly in the plaint that on the day on which the period of limitation expired the Court was closed—*Teckchand v. Patlo*, 16 N.L.R 198, 56 I.C. 926.

5. Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment * * * for the time being in force, may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation :—The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section.

Change :—By the Limitation Amendment Act X of 1922, the words "by or under any enactment" have been substituted for the words "by any enactment or rule." The reason has been thus stated: "We think that the words 'made applicable by any enactment or rule' are, in so far as they apply to rules, vague, inasmuch as there is no definition of the term 'rule'." The intention no doubt is to refer to a statutory rule or a rule having the force of law, e.g. rules contained in the schedule to the Code of Civil Procedure and in particular, order 22, rule 9. We would therefore amend section 5 by substituting the words 'by or under any enactment' for the words 'by any enactment or rule'—*Report of the Select Committee*—(Gazette of India, 1922, Part V, page 73). As to the effect of this amendment see the Full Bench case of *Krishnamachariar v. Srirangammal*, 47 Mad 824, 47 M.L.J. 409, 80 I.C. 877, A.I.R. 1925 Mad. 14.

41. Scope of section :—Under the Act of 1877, this section did not include any other application except an application for review of judgment. Thus it did not apply to an application for leave to appeal as a pauper—*Parvati v. Bhola*, 12 All. 79; *Sarat Chandra v. Brojeswari*, 30 Cal 790; *R. C. Roy v. Thakur Ram*, 10 C.W.N. 149 (F.B.); nor to an application for leave to appeal to the Privy Council—*In the matter of Sita Ram*, 15 All. 14; *Moroba v. Ghanasham*, 19 Bom. 301; *Veerammiah v. Abbiah*, 18 Mad. 99 (F.B.). The present section will apply to these applications. The words "application for leave to appeal" are wide enough to include an application for leave to appeal as a pauper—*Ram Charan v. Bansidhar*, 26 A.L.J. 847, A.I.R. 1928 All. 499.

The High Court has power to frame a rule making the provisions of this section applicable to applications for setting aside *ex parte* decrees—*Krishnamachariar v. Srirangammal*, (supra). In Madras, this section has been made applicable by a Rule of the High Court to application to set aside an *ex parte* decree, whether in ordinary Courts or in S

Cause Courts; and the delay in making the payment required to be made with an application to set aside an *ex parte* decree, under the proviso to section 17 (1) of the Prov. Small Cause Courts Act, can be excused if there be sufficient cause for it—*Sudalaimuthu v. Andi Reddiar*, 45 Mad. 628, 42 M.L.J. 484, 66 I.C. 104, A.I.R. 1922 Mad. 186. But in Bengal, U. P., Oudh, Bombay, Punjab and Burma this section has not been made applicable to an application to set aside an *ex parte* decree—*Tarasanlar v. Basiruddi*, 19 C.W.N. 970, 29 I.C. 476; *Gadre v. Brijnandan*, 45 All 332 (334), *Shavaksha v. Hogarth*, 12 Bom. L.R. 886, 8 I.C. 616; *Khairati v. Umar Din*, A I R. 1922 Lah. 266, 66 I.C. 270; *Chowdhury Hiat v. Jaikishen*, 32 P.R. 1878; *Pal Singh v. Hurnam Singh*, A.I.R. 1927 Lah. 342, 100 I.C. 936; *Ma Naw v. Somasundaram*, 2 Rang 655, 85 I.C. 324; *Ram Autar v. Sheo Piarey*, 12 O L J. 137, A.I.R. 1925 Oudh 411; *Sitabai v. Mata Din*, 2 O.W.N. 440, A I R. 1925 Oudh 446. In a Lahore case, Chais J., has expressed the opinion that section 5 should be made applicable to all applications under Articles 163, 164, 168 and 169—*Lat Devi v. Amar Nath*, 57 I.C. 15 (16)

It should also be noted that this section does not apply to suits. This section applies only to those proceedings which are specifically mentioned in the section or to which the section may be made applicable by or under any enactment for the time being in force. A suit is not specifically mentioned in this section nor are the provisions of this section made applicable to it by any enactment—*Ram Pher v. Ajudhia Singh*, 12 O L J. 66, 2 O W.N. 144, 87 I.C. 17, A.I.R. 1925 Oudh 369. The reason is, that the period of limitation allowed in most of the suits extends from three to twelve years, whereas in appeals and the applications mentioned in this section, it does not exceed six months, therefore it is necessary that some concession should be made in respect of these appeals and applications, to provide for those circumstances which hinder a person from filing his appeal or application within the short space of time allowed.

By section 231 of the Agra Tenancy Act, this section has been made applicable to suits under that Act.

This section has not been made applicable by any enactment to an application (under O. 9, r. 9, C. P. Code) to set aside a dismissal for default of appearance (Art. 163)—*Mahadeo v. Lakshminarayan*, 49 Bom 839, 27 Bom. L.R. 1150, 90 I.C. 610, A.I.R. 1925 Bom. 521; *Ma Naw v. Somasundaram*, 2 Rang 655, A.I.R. 1925 Rang. 187; *Shah Ditta v. Roda*, 83 P.R. 1902; *Saba v. Dayaram*, 23 N L.R. 183, A.I.R. 1928 Nag. 91 (92). So also, this section does not apply to an application to set aside an execution sale under O. 21, r. 89, C. P. Code—*Ram Autar v. Sheo Peary*, 12 O L J. 137, A I R. 1925 Oudh 411, 87 I.C. 722; *Umrao Singh v. Beni Prasad*, 92 I.C. 839. This section does not apply to an application for substitution of the name of a defendant or respondent under O. XXII, r. 4, made beyond six months [now three months] of his death. An application for substitution made beyond the period of limitation must therefore be rejected and the suit will abate. But it is open to the plaintiff or appellant to make an application under O. XXII, r. 9 to

have the order of abatement set aside on the ground that he was prevented by sufficient cause from continuing the suit—*Secretary of State v. Jowahir*, 36 All 235, 25 I.C. 48. This section has been made applicable to applications under Order XXII, rule 9 (2) of the C.P. Code. See O. XXII, r 9 (3).

This section does not apply to applications for setting aside awards; it is not competent for the Court to receive such applications after the expiry of the period prescribed by Art. 158—*Surya Narain v. Banwari*, 18 C.W.N. 626 (628), 17 P.C. 7. *Devi Ditta v. Babu Ram*, 8 Lah 274, 100 I.C. 955, A.I.R. 1927 Lah 273.

This section does not apply to an application for execution of a decree, in the absence of any enactment or rule which makes the section applicable to such an application—*Midnapore Zemindary Co. v. Deputy Commissioner* 3 P.L.J. 132, (134, 135), 44 I.C. 570, *Ram Roy v. Umraji*, 93 I.C. 292, A.I.R. 1926 All. 345, nor to an application to set aside an execution sale under Art. 166—*Asa Nand v. Jhangi Ram*, 29 P.L.R. 1919, 50 I.C. 610.

This section does not apply to an application under O. 41, rule 19, C.P. Code for re-admission of an appeal dismissed for default of appearance; and if the application is not made within 30 days (Art. 168), the appeal cannot be readmitted for any sufficient cause—*Krishnaswami v. Chengalroya*, 47 Mad 171, 45 M.L.J. 813, 76 I.C. 836, A.I.R. 1924 Mad. 114; *Mahi v. Jiwan*, 141 P.R. 1879.

It does not apply to an application for filing an award (Art. 178)—*Ram Ugrah v. Achraj Nath*, 38 All 85 (91), 13 A.L.J. 1115.

Criminal appeal—This section applies to criminal appeals, and a criminal appellate Court has power to excuse delay and admit a time-barred appeal, if the Court is satisfied that the appellant had sufficient reason for not preferring the appeal within the prescribed period. But if the Court is not so satisfied, it cannot excuse the delay. If in such a case the appellate Court desires to help the appellant, the proper procedure would be to move the High Court to exercise its powers of revision—*Janakiramayya v. Brahmayya*, 48 M.L.J. 457, 88 I.C. 278, A.I.R. 1925 Mad. 709.

But in the case of a *Criminal application*, the time cannot be extended, even though the delay arises in consequence of any genuine mistake—*Girimal v. Shewaram*, 20 S.L.R. 90, 95 I.C. 316, A.I.R. 1926 Sind 215.

42. Application of section to special or local laws:—Under section 29 (2) as recently amended by the Limitation Amendment Act (X of 1922), the provisions of section 5 "shall not apply for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law." Therefore the decisions in *Reference under the Forest Act*, 10 Mad. 210, *Ram Kishen v. Umrao*, 80 P.W.R. 1916, 33 I.C. 730, *Waryam v. Wadhava*, 89 P.R. 1918, 46 I.C. 588, *Mohant Krishna Dayal v. Syed Abdul*, 2 P.L.T. 402, are no longer good law.

This section does not apply where the period of limitation for an appeal is fixed not under this Act but under the *Rules of the*

Court—Bajinath v. Doolarey, 50 All 865, 26 A.L.J. 1317, A I R 1928 All. 708.

This section did not apply to applications under section 22 of the Insolvency Act (1907)—*Thakur Prosad v. Punno Lal*, 35 All. 410, 20 I.C. 673. But under section 78 of the new Insolvency Act V of 1920, section 5 has been specially declared to be applicable to all appeals and applications under that Act—*Nur Mahomed v. Lal Chand*, 26 P.L.R. 501, 90 I.C. 254, A I R. 1925 Lah 436 (437).

Section 5 of the Limitation Act has no application to proceedings under the Land Acquisition Act—*Kristo Singh v. Secretary of State*, 8 P.L.T. 710, 103 I.C. 295, A I R. 1927 Pat. 333. Nor can it be applied in computing the period of limitation laid down in sec. 169 of the Indian Companies Act (1882) which lay down a special period of limitation—*Daulat Ram v. Woollen Mills Co.*, 95 P.R. 1908.

43. Duty of Court :—This section gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; and the Judge must exercise his discretion under this section with reference to the special circumstances of each case—*Krishna v. Chathappan*, 13 Mad 269 (271); *Fakir Chand v. Municipal Committee*, 59 P.R. 1913, 18 I.C. 37. When the time for appealing is once passed, a very valuable right is secured to the successful litigant and the Court must therefore be fully satisfied of the justice of the ground on which the appellant seeks to obtain an extension of time for attacking the decree and thus perhaps depriving the successful litigant of the advantages which he has obtained—*Karsondas v. Bai Gungabai*, 30 Bom. 329 (330); *Karachi Trading Company v. Tejchand*, 8 S.L.R. 235, 28 I.C. 82, *Tarini v. Gopewar*, 7 I.C. 391, 12 C.L.J. 615 (617), *Dund Bahadur v. Deo Nandan*, 17 C.L.J. 596, 20 I.C. 513; *Fakir Chand v. Municipal Committee*, (supra). When a Court is asked to exercise its discretion under this section it has to see whether the appellant is asking what is evidently unjust. If it is, he should not have it; if he is asking for what may lead to injustice, he should not have it except on terms which would prevent any injustice possibly being done—*Banomal v. Padma*, 16 C.L.J. 366, 16 I.C. 425. "The Court has the power to grant the special leave, and, exercising its judicial discretion, is bound to give the special leave, if justice requires that leave should be given"—per Brett M. R. in *In re Manchester Economic Building Society*, 24 Ch D 483 at p. 497. But it is not a sound exercise of judicial discretion to extend time in favour of a person who appears to have no substantial point to argue—*Maqbul Ahmad v. Murla*, 14 A.L.J. 212, 33 I.C. 546.

44. Reasons to be recorded .—The reasons for admitting the appeal etc. beyond time must be recorded by the Court—*Zaibunissa v. Kulsam*, 1 All 250; *Chaturbhuj v. Md. Habib*, 54 I.C. 36 (38) (Pat). When an application is made for extension of time under this section, it is desirable that the Court should record its opinion as regards that application even when it is rejected—*Adarpriya v. Rampratap*, 30 C.W.N. 926, A.I.R. 1926 Cal. 1105, 99 I.C. 748.

45. Duty of Appellant—It is the duty of a litigant to know the last date on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in this section, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies—*Krishnaswamy v. Ramasami*, 41 Mad. 412 (P.C.), 22 C.W.N. 481, 21 Bom.L.R. 541, 16 A.L.J. 27, 43 I.C. 493. A person bringing before the Court a time-barred appeal must satisfy the Court that he had sufficient cause for not presenting the appeal within time and must furnish a detailed affidavit explaining the cause of the delay—*Chaturbhuj v. Muhammad Habib*, 54 I.C. 36; *Bur Singh v. Firm Jodha Ram*, 95 I.C. 565, A.I.R. 1926 Lah. 542. An appeal or application filed out of time must show on the face of it the reason for the delay, and there must further be an express prayer for condonation of the delay under this section—*Laurentius v. Dukhi*, 4 Pat. 766, 7 P.L.T. 362, 92 I.C. 179, A.I.R. 1926 Pat. 73. He must show that he has not been negligent and that he has been prosecuting his case with due diligence—*Habibullah v. Banarsi Das*, 22 O.C. 379, 55 I.C. 837 (838). He is bound to give a proper explanation of every day's delay or of a major portion of the delay—*Krishnaswami v. Ramaswami*, 19 M.L.J. 209, 1 I.C. 73; *Ramaswami v. Venkatanarasimha*, (1916) 1 M.W.N. 277, 32 I.C. 1000; *George Gowshala v. Balak Ram*, 103 I.C. 498, A.I.R. 1927 Lah. 717. But it is only the delay of those days which are beyond the period of limitation which must be explained by the appellant in making out sufficient cause why the appeal was not presented on the last day; but no explanation is needed of the inaction during the period of limitation antecedent to the last day—*Karali v. Apurba*, 34 C.W.N. 1119 (1126).

46. Sufficient Cause—It is difficult and undesirable to attempt to define precisely the meaning of the words 'sufficient cause' or 'sufficient reason'. To do so would be to crystalize into a rigid definition that judicial power and discretion which the Legislature has, for the best of all reasons, left undetermined and unfettered—*In re Manchester Economic Building Society*, 24 Ch D. 488. What constitutes sufficient cause cannot be laid down by hard and fast rules. It must be determined by a reference to all the circumstances of each particular case—*Shib Dayal v. Jagannath*, 44 All. 636 (640); *Gobind Lall v. Shibadas*, 33 Cal. 1323, *Haradhan v. Prankrishna*, 10 C.L.J. 39, 2 I.C. 961. The discretion given by sec. 5 should not be defined and crystallised so as to convert a discretionary matter into a rigid rule of law. But the discretion in each particular case should be exercised on its own facts with a view to secure furtherance of justice—*Ambica v. Manikganj Loan Office*, 55 Cal. 798, 32 C.W.N. 372 (374); *Rakhal Chandra v. Asutosh*, 17 C.W.N. 807. "Sufficient cause" seems to mean not only those circumstances (such as the Court being closed or time spent in obtaining copies, or the party being a minor or insane) which the law expressly recognizes as extending the time, but also such circumstances as are not expressly recognized but which appear to the Court to be reasonable looking to all

the facts of the case—*Kichilappa v. Ramanujam*, 25 Mad. 166 (171). The words “sufficient cause” should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of *bona fides* is imputable to the appellant—*Krishna v. Chathappam*, 13 Mad. 269 (271); *Shib Dayal v. Jagannath*, 44 All 636 (640); *Gobinda v. Shibadas*, 33 Cal. 1323; *Sarat Chandra v. Saraswati*, 34 Cal. 216 (219); *Secy. of State v. Tirath Ram*, 9 Lah. 76, *Kichilappa v. Ramanujam*, 25 Mad. 166 (171). The Court should not apply too exacting a standard of diligence, and if the delay, under the circumstances, is not one that can be considered as unreasonable, the Court should exercise the discretion under this section—*Kamiruddin v. Bisnupriya*, 33 C.W.N. 76 (78), A.I.R. 1929 Cal. 240, 119 I.C. 383. In exercising the discretion in favour of the applicant under this section, the Court must be satisfied that the applicant was not guilty of unnecessary laches—*Mumtaz Ali v. Ugraj*, 12 O.L.J. 94, 86 I.C. 270, A.I.R. 1925 Oudh 371, 28 O.C. 378.

A Court should no doubt give a liberal construction to the words “sufficient cause” but the interpretation must be in accordance with judicial principles and with due regard to the respondent's side of the question. The period for preferring an appeal must not be extended simply because the appellant's case is hard and calls for sympathy—*Fakir Chand v. Municipal Committee*, 59 P.R. 1913, 18 I.C. 37. Courts will not extend the period of limitation merely out of benevolence to the party seeking relief—*Carter v. Stubbs*, 50 L.J.C.L. 4.

SUFFICIENT CAUSE, WHAT IS AND WHAT IS NOT:—

47. Illness.—Illness may be sufficient cause, but it must be proved that the man was utterly disabled to attend to any duty—*L. E. H. U. v. A. H. Yin*, U.B.R. (1897-1901) 451. Illness of the pleader, and the client's ignorance of it, is a sufficient cause—*Anundmoyee v. Poornoo*, 9 M.L.A. 26. But illness in the family and consequent delay in making arrangement for the appeal is no sufficient cause—*Elahi v. Bisweswar*, 79 I.C. 924, A.I.R. 1925 Cal. 175. Illness is sufficient cause if the appellant was ill at the time when the period of limitation for filing the appeal expired. But if the appellant had recovered from illness before the expiry of the period, he was not entitled to delay the filing of the appeal and to claim a deduction of the days of his illness like the days required for obtaining copies—*Ma Thein v. Ma U Byu*, 6 Rang. 271, A.I.R. 1928 Rang. 165.

48. Imprisonment.—Imprisonment in a criminal jail may be a sufficient cause and the time spent in jail may be deducted—*Maharaj Narain v. Banoji*, 21 P.R. 1904; but the fact that a person imprisoned thought that he had no right of appeal and that his relative would appeal if he had a right is not a sufficient cause—*Q. E. v. Bhoni Ram*, 1891 A.W.N. 10.

49. Mistake:—Mistake made by the officer of the Court in not preparing correct copies of the judgment and decree is a sufficient cause,

even if there was a contributory delay on the appellant's part in showing the mistake—*Dalgit v Ram Ratan*, 25 I C 26 (Oudh) A *bona fide* omission by the appellants to sign the *Vakalatnamah* is a sufficient cause for admitting the appeal after limitation after allowing the defect to be made good—*Habeeb v Naush*, 11 A L J 779, 21 I C 444 (445) Filing an appeal by a wrong person through a *bona fide* mistake is a sufficient cause to entitle the right person to be admitted as an appellant after the expiry of the period of limitation—*Dwarka Nath v Debendra Nath*, 4 C.W.N 58 (62) The name of a wrong person was entered as that of the respondent through a mistake which was corrected but after time; it was held that the appeal was properly admitted—*Jamna v. Ibrahim*, 1888 A W N 58 Where the name of a respondent was omitted and the omission was due to a *bona fide* mistake on the part of the clerk of the counsel, the Court can allow the name of the respondent to be brought on the record after the expiry of the period—*Gaya v. Chottoo*, 12 A L J 941, 26 I C. 68 (69). In order to determine whether a mistake ought to be excused under this section, the test is this: if the mistake or carelessness is real and unintentional, and no damage has been done to the other side that cannot be repaired by costs or otherwise, the application for excusing the delay must be granted; if, on the other hand, the negligence is culpable, or there are *mala fides* on the part of the applicant or irreparable hurt would result to the other side, the application must be dismissed—*Ramachandran v Sabapathy*, 54 M L J 234, A.I.R. 1928 Mad. 404 (406). Where an appeal is filed a day later, through oversight of the counsel's clerk, time may be extended under sec 5 Thus, where an appeal which ought to have been filed on the 10th was actually filed on the next day, and it appeared on affidavit that the vakil gave two cases to his clerk on the 8th with oral instructions to put in this appeal on the 10th and another revision petition on the 11th, but by mistake the clerk entered the same wrongly in his diary, and filed the appeal on the 11th, held that under these circumstances the Court would be justified in giving an extension of time under this section—*Ichhar Singh v. Natha*, 27 P.L.R. 623, A.I.R 1926 Lah 693, 98 I C. 514. Where an appeal was filed by a prisoner who had been sentenced to imprisonment exceeding 4 years, but the appeal instead of being sent to the High Court under sec. 408 (b) Cr. P. Code was by mistake of the Jail authorities sent to the Sessions Court, and when the appeal ultimately came to the High Court, the period of limitation had expired, held that the appeal should be accepted by the High Court, as the prisoner ought not to suffer for the delay which was not due to any fault of his own—*In re Abdulla*, 2 Rang. 486 (487)

Mistake of counsel if made bona fide is sufficient cause—Pritchard v. Pritchard, 14 Q B D 55; *Johnson v. Warwick*, 17 C.B. 516; *Gopal v. Solomon*, 11 Cal 767; *Corporation v. Anderson*, 10 Cal. 445; *Bishendit v. Nandan*, 12 C.W.N. 25 (per Woodroffe J), *Ahmed v. Shamsulnisa*, 1918 P.L.R. 10, 45 I C. 542; *Resal Singh v. Shadi*, 95 P.R 1917, 43 I.C. 317. And a client preferring a time-barred appeal under the mistaken advice of his counsel is entitled to the benefit

this section—*Anjora v. Babu*, 20 All. 638; *Kurd Mal v. Ram Nath*, 28 All. 414; *Promatha v. Bhabataran*, 46 C.L.J. 257, 105 I.C. 217, A.I.R. 1927 Cal. 829; *Azimulla v. Gokal*, 32 I.C. 640, 1916 P.W.R. 37; *Shib Dayal v. Jagannath*, 44 All. 636, 20 A.L.J. 674, 68 I.C. 812; *Chhotey v. Devi Brij Rani*, 6 O.W.N. 1042, A.I.R. 1930 Oudh 49. So also, the filing of an appeal in the wrong Court under the mistaken advice of counsel is sufficient cause for filing it afterwards in the proper Court after the period of limitation, provided the appellant acted with reasonable diligence in the prosecution of the appeal—*Dattatraya v. Secretary of State*, 45 Bom. 607, 23 Bom. L.R. 89, 60 I.C. 744; *Ambica v. Manikganj Loan Office Ltd.*, 55 Cal. 798, 32 C.W.N. 372; *Sundarabai v. Collector*, 43 Bom. 376 (P.C.); *Debendra v. Nagendra*, 30 C.W.N. 479, A.I.R. 1926 Cal. 688, 43 C.L.J. 106 (following *Brij Inder v. Kanshi Ram*, 45 Cal. 94 P.C.); *Parbhu v. Jai Mangal*, A.I.R. 1928 All. 144. But the mistake of Counsel must be of such a description that it might arise even amongst practitioners of experience—*S. C. Dey v. Rajwantli*, 6 P.L.J. 237, 3 P.L.T. 96, A.I.R. 1923 Pat. 140. The mistake must be *bona fide* i.e., made inspite of due care and attention—*J. N. Surty v. Chettiar Firm*, 4 Rang. 265, A.I.R. 1927 Rang. 20; *Ma Ngwe Yun v. Ma Pa*, 5 Bur.L.J. 227, 101 I.C. 363. Where the pleader made a mistake by relying upon an erroneous statement of the clerk of the Court that an application for copy would not be accepted until the decree was signed, held that the pleader ought to have known the law, and that the mistake was not made with due care and attention—*Mg. Po Kyaw v. Ma Lay*, 7 Rang. 18, 117 I.C. 251, A.I.R. 1929 Rang. 116 (117). The question is whether the error is one which might have easily occurred even if reasonably due care and attention has been exercised by the pleader—*Tin Tin Nyo v. Maung Ba Saung*, 1 Rang. 584, A.I.R. 1924 Rang. 148.

Even though the pleader might have been guilty of great carelessness, the appellant ought not to be made to suffer where he acted implicitly relying on the advice of his pleader, as for instance in a case where the appellant being seriously ill sent all the necessary papers and costs to his pleader who was practitioner of over 15 years' standing, and the pleader under a wrong impression filed the appeal in a wrong Court—*Ambica Ranjan v. Manikganj Loan Office*, 55 Cal. 798, 32 C.W.N. 372 (370, 377).

The tendency of recent English cases is to disallow an extension of time on the ground of mistake of Counsel; see *In re Helsby*, [1894] 1 Q.B. 742 (Judgment of Davey L.J.). This principle of English law was sought to be applied in this country, but in *Shib Dayal v. Jagannath*, 44 All. 636 (639) the Judges remarked that although legal education has progressed in this country and the Courts are right in demanding increasing competence in legal practitioners, still having regard to the disadvantages of practitioners in places remote from Law Libraries, and to the fact that there is in the mofussil some want of knowledge of the procedure of the High Court, the principle of English decisions should not be strictly applied in this country.

By a piece of carelessness, counsel for the appellant omitted to file a copy of the decree appealed against, and instead filed a copy of a deposition. The mistake was detected after the expiry of the period of limitation. It was held that the Court should allow the copy of the decree to be filed—*Harjas v. Kahni*, 85 P.R. 1913, 19 I.C. 438. Where the appellant obtained a copy of the decree to be appealed against, and gave it in time to his Vakil, but by some mistake the Vakil did not file the copy of the decree and died soon after, the High Court excused the delay and accepted the copy at the hearing of the appeal—*Prosanna Kumari v. Ram Chandra*, 17 C.L.J. 66, 17 I.C. 155. Where the delay in the production of the first Court's judgment was due to the mistake of the Vakil in applying for a copy of the decree instead of a judgment, the delay in the production of the same must be excused under this section—*Firm of Amba Parshad v. Jwala Dat*, 27 P.L.R. 239, 8 Lah L.J. 101, 94 I.C. 629.

Act XXVI of 1920 which cut down the time for leave to appeal to the Privy Council and for substitution of legal representatives from 6 months to 3 months, came into force on 1st January 1921. In respect of a judgment delivered a few days later, the party on the advice of his local pleaders applied for leave within the six months' period, but after the 3 months' period had expired. There was a delay of only 14 days. Held that as the amending Act was very recently passed, it took some time before the curtailed period of limitation came to be generally known, and the amending Act was not available in any of the books on the Indian Limitation Act that might be referred to for the purpose. Under these circumstances the local pleaders might honestly, though mistakenly, be under the belief that the period was six months, and so it was a fit case for excusing the delay under this section—*Nagindas v. Nilaji*, 48 Bom. 442, 26 Bom. L.R. 395, 80 I.C. 862, A.I.R. 1924 Bom. 399; *Vaithinatha v. Gobindaswami*, 41 M.L.J. 65, 62 I.C. 795. But in a Nagpur case the delay was not excused on this ground, see *Padamraj v. M. B. Kaisha*, A.I.R. 1924 Nag. 279, 78 I.C. 154.

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49A. Mistake or ignorance of law.—A mistake or ignorance of law is not a sufficient cause. The maxim *Ignorantia legis neminem excusat* (ignorance of law is no excuse) has been so firmly settled both in England and India that it would be the shaking of established authority to maintain that ignorance of law or mistakes of

law are reasons for the excuse, and as such furnish elements for extending the period of limitation which the statute law has provided—*Ramjiwan Mal v. Chand Mal*, 10 All. 587 (597) ; *Jag Lall v. Har Narain*, 10 All. 524 (529) ; *Brij Indar v. Kanshi Ram*, 45 Cal. 94 (106) (P.C.). Therefore, if an appellant prefers an appeal from a decree for an amount exceeding Rs 5,000, to the District Judge instead of to the High Court, and after it is returned by the former Court files it subsequently in the latter Court at a time when the period of limitation has expired, the mistake cannot be excused under this section—*Ibid.* So also, an appellant filing an appeal after the expiry of the period of limitation owing to a stupid misconstruction of the lower Court's order appealed against, is not entitled to the benefit given under this section—*Hasibunnissa v. Bishnath*, 13 O.L.J. 172, A.I.R. 1926 Oudh 206, 91 I.C. 867. The fact that the appellant was under the impression that the limitation was 90 days, was no reason for extending the period—*Dial Singh v. Buddha Singh*, 2 Lah. 127, 61 I.C. 327. The Bombay High Court also holds that mere ignorance of law cannot be recognised as sufficient cause for delay, for that would be a premium on ignorance—*Sitaram v. Nimba*, 12 Bom. 320 (per West J.). And in a Full Bench case of the Allahabad High Court (*Bechi v. Ahsanullah*, 12 All 461) Mahmood J. expressed an opinion that "speaking with strict accuracy there can be no such thing as a *bona fide* mistake of law, for good faith implies due care and caution" and he quoted with approval the words of West J. in 12 Bom. 320 cited above.

But it cannot be laid down as a general proposition that ignorance of law can never be considered ; in very special cases it may be a sufficient cause—*Gulam Shah v. Mallick Mazaffar Khan*, 81 P.R. 1886 (F.B.). If the mistake be *bona fide* it will be considered as sufficient cause within the meaning of this section. The true rule is, whether under the special circumstances of each case, the appellant acted under an honest though mistaken belief formed with due care and attention—*Krishna v. Chathappan*, 13 Mad. 269 (271). Before a mistake of law can be accepted as sufficient cause, it is necessary to satisfy the Court not only that the mistake was honestly made, but also that it was made despite due care and attention on the part of the appellant or his pleader—*Fakir Chand v. Municipal Committee*, 59 P.R. 1913, 18 I.C. 37. And so, where the appellant who as a pleader should have known the law on the subject, had the advantage of the advice of a leading pleader of the Chief Court, but for reasons best known to himself went against that advice in preferring the appeal, it was held that the appellant had no sufficient cause for not instituting the appeal within the period of limitation, as he could not possibly have made the mistake had he taken the precaution of discussing the subject with his pleader with reference to the question of limitation, and to the case-law on the point, and that his mistake, though honest, was the result of either carelessness or an erroneous assumption of knowledge which he took no care to verify—*Ibid.* Where the appellant was an ignorant milkman having no experience of any previous litigation, and though he knew of the respondent's death,

he did not know that the substitution of his legal representatives was necessary and he came to know of this when it was too late to apply for substitution of the deceased respondent's legal representatives, *held* that under the circumstances of the case the delay was *bona fide*, and sufficient cause was shown under this section—*Krishna Mohan v. Surapati*, 29 C.W.N. 472, A.I.R. 1925 Cal. 684, 94 I.C. 929. See also *Ramachandran v. Sabapathy*, 54 M.L.J. 234, A.I.R. 1928 Mad. 404 (406), where a minor made a similar mistake, and the delay was excused. An appeal to the High Court under sec. 476B of the Criminal Procedure Code against an order of civil court refusing or making a complaint under sec. 476, is nevertheless a *criminal* appeal governed by the 60 days' period of limitation prescribed by Art. 155, and not a *civil* appeal governed by Art. 156. Where, however, the appellants were under a *bona fide* mistake that it was a civil appeal governed by the 90 days' period of limitation under Article 156, and filed their appeal accordingly, *held* that it was a proper case for excusing the delay—*Rajani Kanta v. Bistoomani*, 46 C.L.J. 40, 104 I.C. 456, A.I.R. 1927 Cal. 718 (720); *Sheo Prasad v. Sheo Bans*, 24 A.L.J. 368, A.I.R. 1926 All. 211 (212), 93 I.C. 851. Where an application for leave to appeal under sec. 449 Cr. P. Code against a sentence passed by a Judge of the High Court sitting in sessions was presented after the period of 60 days prescribed by Art. 155, and it appeared that the delay was due to a mistake on the part of the jailor who was under the impression that it was a non-appealable sentence, *held* that there was sufficient cause for excusing the delay under sec. 5—*Gallagher v. Emp.*, 54 Cal. 52, 101 I.C. 657, A.I.R. 1927 Cal. 307. See also Notes 50 and 51 below.

50. Wrong proceedings taken in good faith.—Where a person *bona fide* thinking that it was the proper course, filed a suit instead of appealing from a decree, and soon after found out the error and preferred the appeal, it was a 'sufficient cause'—*Ghulam v. Shahbaz*, 162 P.R. 1888; *Sitaram v. Nimba*, 12 Bom. 320.

Similarly, where a person believing in good faith that a petition for revision, and not an appeal, was the proper remedy, and in pursuance of that belief presented the petition, it was a sufficient cause for subsequently preferring an appeal after the period of limitation—*Balwant v. Gumani*, 5 All. 591, *Hardwan v. Raja Protab*, 5 O.C. 183. But if he does not act in good faith, *i.e.*, if he knows properly well that he ought to file an appeal but still he files an application for revision, it will not be considered a sufficient cause for afterwards filing an appeal out of time—*Umed Ali v. Municipal Committee*, 2 Lah. 1 (4), 56 I.C. 148.

The time taken in applying for a review of judgment may be deducted in calculating the period of limitation for an application for leave to appeal to the Privy Council—*Nariman v. Hasham*, 26 Bom. L.R. 1261, 49 Bom. 149, A.I.R. 1925 Bom. 137, 85 I.C. 191.

So also, the preferring of an application for review will be considered as a sufficient cause for delay in filing an appeal, if the appellant can shew that the grounds for review were reasonable and proper and

that these grounds could not be grounds for appeal as well—*Ashanulla v. Collector of Dacca*, 15 Cal. 242 (243) ; *Govinda v. Bhandari*, 14 Mad. 81 ; *Sudhakar v. Sadashiv*, 19 C.W.N. 1113, 31 I.C. 705 ; *Gobind v. Shiva Das*, 33 Cal. 1323 (1329) ; *Haradhan v. Prankrishna*, 2 I.C. 961, 10 C.L.J. 39 ; *Pundlik v. Achut*, 18 Bom. 84 ; *Seshagiri v. Venkatesh*, 29 Bom. L.R. 344, A.I.R. 1927, Bom. 221, 101 I.C. 432 ; *Waryam v. Wadhava*, 89 P.R. 1918, 46 I.C. 588 (589) ; *Kailash v. Bejoy*, 80 I.C. 786, A.I.R. 1925 Cal. 253 ; *Shah Mahomed v. Md Roshan*, 26 P.L.R. 456, 88 I.C. 327 ; *Messadi Lal v. Badhawa*, 100 P.R. 1910, 8 I.C. 1156 ; *Maung Lun v. Maung Dun*, 1 Bur. L.J. 154, 74 I.C. 39 ; *Hanumal v. Atma Ram*, 47 P.L.R. 1915, 27 I.C. 799 ; *Parbhu v. Murlidhar*, 22 A.L.J. 365, 78 I.C. 677, A.I.R. 1924 All. 867. But the mere fact that the appellant had applied for review is not a sufficient cause for not filing his appeal within time, and he is not always entitled to be allowed a deduction of time spent in applying for a review of judgment. If there are no reasonable grounds for making the application for review, and the grounds for the application for review are found to be all grounds of appeal and none of them are grounds for review, the presentation of the application for review is not a sufficient ground for not presenting the appeal within time—*Ashanulla v. Collector*, 15 Cal. 242 (244). Another test is, whether the appellant has acted with reasonable diligence (on the application of the principle of section 14) ; and he ought ordinarily to be deemed to have acted with due diligence when the whole period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal—*Karam Baksh v. Daulat Ram*, 183 P.R. 1888, followed by the Privy Council in *Brij Indar v. Kanshi Ram*, 45 Cal. 94 (105) (P.C.) ; *Ram Charita v. Ram Narayan*, 52 I.C. 959 (960) (Pat.). All that the appellant has to show under this section is that he prosecuted the review application with due diligence, and that there were reasonable grounds for filing such an application for review. But it is not necessary for him to show that his application for review had a prospect of success—*Ramdhani v. Khakshardas*, 92 I.C. 1031, A.I.R. 1926 Cal. 677. If it appears that the plaintiff had not prosecuted his application for review with due diligence, he will not be entitled to get a deduction of time spent in the review proceedings. Thus, where the plaintiff's suit was dismissed on the 15th August, and on the 10th November, i.e., nearly three months after, he presented an application for review which was rejected on the 15th November, whereupon he preferred an appeal, it was held that the plaintiff-appellant was not entitled to an indulgence under this section, as the application for review was not prosecuted with reasonable diligence—*Azizuddin v. Bhag Mal*, 107 P.R. 1918, 46 I.C. 23 ; *Govinda v. Bhandari*, 14 Mad. 81.

Again, immediately after the termination of the wrong proceedings (whether the proceedings be in review or revision) the appeal must be preferred with due diligence in order to get the benefit of this section --

Kuller v. Jeewan, 22 W.R. 79 ; *Krishnadas v. Rahimannissa*, A.I.R. 1926 Cal. 457 ; *Ganga v. Madho*, 89 P.R. 1882 ; *Sahiba v. Hira*, 166 P.R. 1883 ; *Karam Baksh v. Daulat Ram*, 183 P.R. 1888 ; *Ganda Singh v. Javala*, 140 P.L.R. 1911, 10 I.C. 129.

51. Proceedings in wrong Court through bona fide mistake :—Where an appellant preferred an appeal to a wrong Court, believing *bona fide* that the appeal lay there, that is a sufficient cause, and the appellant is entitled to deduct the time during which the appeal was pending in the wrong Court—*Balaram v. Sham*, 23 Cal. 526 ; *Dadabhai v. Maneksha*, 21 Bom. 552 ; *Rupa Thakurani v. Kumud Nath*, 22 C.W.N. 594, 46 I.C. 116 ; *Hurro Chunder v. Surnomayi*, 13 Cal. 266 ; *Mahabat Rai v. Bharadwaj*, 37 I.C. 818, 15 A.L.J. 200, *Krishna v. Chathappan*, 13 Mad. 269, *Indar Lal v. Deojit*, 4 A.L.J. 1 ; *Sardar Partan v. Lala Karm*, 184 P.R. 1889, *Mg Sin v. Mg Po.*, 4 Bur. L. T. 224, 12 I.C. 28. Although section 14 does not apply to appeals, still the circumstances mentioned in that section (*viz.*, proceeding in a wrong Court through *bona fide* mistake) may be considered as a sufficient cause within the meaning of section 5 so that the time during which an appeal has been preferred and pending in a wrong Court may be excluded for the purpose of calculating time, and the Court may excuse the delay in bringing the appeal before the proper Court—*Balwant v. Gumani*, 5 All. 591, *Kamuruddin v. Bisnupriya*, 33 C.W.N. 76 (77) ; *Kumudini v. Kamala Kanta*, 35 C.L.J. 106, 68 I.C. 575. But in order to claim the benefit of this section the appellant must satisfy that the mistake is *bona fide*, *i.e.*, made under an honest though mistaken belief formed with due care and attention that he was appealing to the right Court ; otherwise it will not be considered as a sufficient cause—*Jaglal v. Har Narain*, 10 All. 524, *Ramjiwan v. Chand Mal*, 10 All. 587 (594).

Thus, where the appellant was reasonably led into the mistaken belief that the valuation of the suit was such that an appeal lay to the High Court and not to the District Court, *held* that this would constitute a sufficient cause for excusing the delay in presenting the appeal to the proper Court—*Tulso Kanwar v. Gajraj Sing*, 25 All. 71, *Huro v. Surnomayi*, 13 Cal. 266 ; *Krishna v. Chathappan*, 13 Mad. 269, *Gauhar v. Khan Mahammad*, 66 P.R. 1891. Where a criminal appeal preferred by the appellant (who was in jail) was erroneously presented by his counsel in the High Court instead of in the Sessions Court, *held* that the mistake made by the counsel should be excused, and the appeal should be allowed to be presented to the proper Court though the period of limitation had expired—*Sarta Singh v. Emperor*, 1 Lah. 508, 59 I.C. 356. Where the appellant wrongly preferred his appeal to the Commissioner, and the Commissioner himself was also under the impression that the appeal was entertainable by him, *held* that there was a *bona fide* mistake—*Chob v. Daryai*, A.I.R. 1924 All. 915, 82 I.C. 594. Where the appellant acting *bona fide* on his counsel's advice filed an appeal in a wrong Court, the counsel acting with due care and attention, there was sufficient cause—*Nawab Mirza Muhammad Bakar Ali Khan v. Muhammad Bakar*, 10 O.C. 291 (294).

But where the appellants being themselves pleaders and well acquainted with the facts of the case, preferred an appeal to a wrong Court, owing to a mistaken calculation as to the value of the suit, due to carelessness, it was held that they did not act in good faith but with gross negligence and carelessness, and were not entitled to an extension of time—*Sarat Chander v. Saraswati*, 34 Cal. 216 (218, 219). So also, where an appeal against a decree for an amount exceeding Rs. 5,000 was first presented to the Divisional Judge who had no pecuniary jurisdiction to hear the appeal, and who therefore returned the appeal for presentation to the Chief Court, where it was subsequently presented but after the prescribed period for limitation, held that there was no *bona fide* mistake but gross carelessness and oversight avoidable with due diligence on the part of the pleader, and the delay was not excusable—*Sant Singh v. Qaim*, 118 P.R. 1908. Where the memorandum of appeal filed in a wrong Court was returned by that Court on the 11th December, and the appeal was afterwards filed in the right Court on the 20th December *i.e.* 9 days after, and no explanation was offered as to the nine days delay, it could not be said that the appellant acted *bona fide i.e.* with due care and diligence, and he was not therefore entitled to the indulgence of this section—*Ramjwan v. Chand Mal*, 10 All 587. Where the appellant knew that the appeal lay to the High Court but still he preferred his appeal to the District Judge who returned the petition of appeal which was afterwards presented to the High Court beyond time, held that there was no sufficient cause for excusing the delay—*Daudbhai v. Emnabai*, 28 Bom. 235; *Umrao Baksh v. Malik Md. Khan*, A.I.R. 1923 Lah. 612, 72 I.C. 732.

52. Amendment of decree—Time should be taken to have run from the date of the decree as originally drawn up, and every amendment made in the decree does not necessarily entitle a party to claim an extension of time for filing an appeal. Whether there is sufficient cause must depend upon the circumstances of each individual case. If the grounds on which the appeal is based are intimately connected with the amendment of the decree, or if the grounds are directed against the decree only in so far as it has been amended, the Court should hold that there was sufficient cause, but if the amendment has no relation to the grounds of appeal, the appeal should not be admitted after time—*Brojo Lal v. Tara Prosanna*, 3 C.L.J. 188 (192); *Sati Kantha v. Ram Chandra*, 34 I.C. 566 (Cal.). Thus, in a suit for arrears of revenue, a decree was passed for Rs. 125 on the 30th of May; on the 15th August, the plaintiff applied for amendment of the decree, on the ground that the arrears of revenue amounted to Rs. 374, and the Court amended the decree then and there. On the 11th September the plaintiff preferred an appeal to the District Judge complaining of disallowance of interest in the decree. Held that as the question of interest could have been raised on the decree as originally passed, and the appeal did not attack the decree in so far as it was amended or raise any question connected with the amendment, the appellant was not entitled to any extension of time and his appeal was time-barred—*Bohra Gajadhar Singh*

v. *Basant Lal*, 43 All. 380, 19 A.L.J. 152, 61 I.C. 69. Where the decree was wrong as to the amount claimed and allowed, it was held that the decree was wrong in a very material particular, and the limitation for appeal should be reckoned from the date of the amended decree—*Amar Chandra v. Asad Ali*, 32 Cal. 908. Where a mortgage decree passed on the 30th June 1914 omitted to specify the decretal amount that could be recovered from the house mortgaged, and the plaintiff applied for amendment which was granted on the 19th November 1914, and the defendant appealed on 19th February 1915, it was held that the defendants were not obliged to appeal from the decree of June 1914 at a time when the plaintiff had applied for an amendment, and that in any event an extension of time would be granted under this section; the appeal was not barred—*Har Kishen v. Lahore Bank Ltd.*, 64 P.R. 1919, 51 I.C. 712 (714).

Where a decree which is wrongly drawn up is amended by the Court after the expiration of the time prescribed for appeal against the original decree, the party affected by the amendment can appeal against the decree as amended, and the delay will be excused under this section—*Viswanathan v. Ramanathan*, 24 Mad 646 (649).

53. Ignorance of fact:—Where an application for bringing the legal representative of the deceased respondent on record was not made within the period of limitation by reason of the appellant not being aware, till shortly before the application, of the death of the respondent who lived at a great distance from him, it was held that the appellant had sufficient cause for not making the application within time—*Allah v. Thakurdas*, 1908 P.L.R. 24, *Sher Bahadur v. Abezar*, 95 I.C. 236. Where a complaint had been filed against the appellant under sec. 476 Cr. P. Code, but he was not aware of the filing of the complaint till after the 30 days prescribed by Art 154 had expired, held that there was sufficient cause for excusing the delay in filing the appeal—*Daga Devji v. Emp.*, 52 Bom. 164, 30 Bom. L.R. 76, A.I.R. 1928 Bom. 64 (65).

54. Judgment not pronounced in open Court:—Where it appeared that the judgment of the lower Court had not been pronounced in open Court nor had any intimation been sent to the parties of any date for its pronouncement, and the appellant or his pleader did not discover what the decision was till after the expiry of the period prescribed for appeal, it was held that there was sufficient cause for excusing the delay in presenting the appeal—*Lall v. Sain Ditta*, 27 P.R. 1919, 51 I.C. 239 (240).

55. Pauper appeal—subsequent presentation of fully stamped appeal.—Where an application for leave to appeal *in forma pauperis* is rejected, but the Court grants time to file an appeal on proper stamp, and the appellant afterwards pays the full Court-fees within the time granted by the Court, though after the expiry of the period of limitation, held that the properly stamped appeal should not be rejected as barred by limitation, as the Court has granted time to the appellant, in the exercise of its discretion under this section—*Bai Fal v. Desai*, 22 Bom. 849; *Buta v. Paramanand*, 84 P.R. 1904; *Girwar Lal v.*

Lakshmi Narain, 26 All. 329 (331); *Jumnabai v. Vissondas*, 21 Bom. 576; *Chintamani v. Ramchandra*, 34 Bom. 589; *Bhagwan Das v. Bahwant*, 36 I.C. 84, 74 P.R. 1916; *Intizam Begum v. Waziran*, 47 P.R. 1899. Where during the pendency of an application for leave to appeal *in forma pauperis*, the appellant acquires some property, whereupon he is declared not a pauper and is ordered to pay Court-fee, and he takes time from the Court to pay the stamp, and pays the stamp within the time granted, though beyond the period of limitation, his appeal will be considered as presented on the date of the application for leave to appeal *in forma pauperis*, and therefore not barred. The case comes under this section—*Durga Charan v. Dookhiram*, 26 Cal. 925; *Shadi Khan v. Umdan Begum*, 52 P.L.R. 1912, 13 I.C. 73.

56. Inability to get stamps:—The last day of filing an appeal was 13th July, but on that day the appellant could not get a stamp. The next day was a holiday. The appeal was filed on the 15th. It was held that the delay was excusable under this section—*Kesho Prosad v. Harbans*, 1 P.L.J. 163, 37 I.C. 211. But in a later Patna case it has been laid down that where the party is guilty of procrastination, e.g. where the law has provided a time limit within which any particular step is to be taken, and a party waits until the last moment before beginning to take action, he is not entitled to the Court's indulgence if an unforeseen accident (e.g. inability to get stamps) prevents the step from being taken within the time prescribed by law—*Seth Jahar v. Pritchard*, 4 P.L.J. 381, I.C. 225. In another Patna case the Judges have expressed the opinion that although appellants who are prevented from filing their appeal within time by difficulties encountered in procuring the necessary Court-fee stamps may possibly rely upon those difficulties as constituting sufficient cause within the meaning of this section for not having filed the appeal within time, still it must be remembered that such difficulties are really due to the litigant's inveterate habit of putting off the purchase of the Court-fee and the filing of the appeal to the very last day—*Ram Sahay v. Kumar Lachmi Narayan*, 3 P.L.J. 74, 42 I.C. 675. In a Nagpur case also it has been held that an appellant who wilfully leaves the preparation and presentation of the appeal to the last day of the period of limitation is guilty of negligence and is not entitled to an extension of time, if some unexpected or unforeseen contingency (e.g. inability to get stamps) prevents him from filing the appeal within time. This section was not provided to encourage negligence, procrastination and laxity—*Kedarnath v. Zumberlal*, 12 N.L.R. 171, 37 I.C. 503.

57. Other Cases:—Filing an appeal as from an order, instead of as from a decree—*Manorah v. Balak*, 1881 A.W.N. 97; change of practice of a Court in receiving appeals and want of notice of such change to a party—*Sukhdial v. Jay Singh*, 101 P.R. 1890; taking proceedings by an appellant to get himself declared a major—*Maharaj Narain v. Banoli*, 21 P.R. 1904; accidental loss of the copy of judgment—*Pir Baksh v. Chaman*, 28 P.L.R. 1, A.J.R. 1927 Lah 734, 100 I.C. 19; these are sufficient causes

Where an application for review was filed out of time but without any negligence on the part of the applicant and soon after the discovery of new evidence, the delay was excused under this section—*Bai Nematlu -v. Bai Nematullabu*, 42 Bom. 295 (301). Where the rule requiring the appellant in a second appeal to file a copy of the judgment of the first Court had only been published in the Gazette a few days before the filing of the appeal, so that there had not been sufficient time for the new rule to become well known to the litigants, and the appeal was afterwards re-filed by the appellant with the first Court's judgment within a reasonable period but after the expiry of the period of limitation, held that there was sufficient cause for excusing the delay—*Muhammad Hassan-uddin v. Saif Ali*, 4 Lah. 122, 74 I.C. 451. Where the question whether the decision of the Trial Court amounted to an order only or to a decree was a doubtful one, and therefore insufficient Court-fee was at first paid on the memorandum of appeal, but full Court-fee was made up after limitation, held that there was sufficient cause to excuse the delay—*Raghubir v. Sohan Devi*, 6 Lah. 233, 86 I.C. 1, A.I.R. 1925 Lah. 381. Omission to sign a memorandum of appeal through oversight, which was otherwise in order and had been duly presented, is a sufficient cause for extension of time—*Firm Mathra Das v. Firm Ram Lal*, 84 I.C. 518, A.I.R. 1923 Lah. 402.

58. Application for copy of decree with insufficient folios :—A decree was passed on Dec. 3 and signed on the following day, and an application for a copy was made on the 10th, with insufficient folios, on the 11th, the officer in charge made a report that the folios put in were insufficient and 9 more were required, and the pleader for the appellant got the information the next day when he supplied the necessary folios; the copy was ready for delivery on the 16th, and the appeal was filed on January 8 next, that is, 36 days after the decree; it was held that the Judge should not throw out the appeal as barred, and that under the circumstances he should exercise his discretion under this section—*Dulali v. Saroda*, 3 C.W.N. 55. See also *Kali Sankar v. Baikantha Nath*, 7 C.W.N. 109.

59. Defective Vakalatnama .—Where the pleader's name is not mentioned in the vakalatnama by pure mistake, or the pleader fails to endorse his acceptance, and the mistakes are due to pure inadvertence and accident and do not proceed from any dishonest intention, there is a sufficient cause for accepting a fresh vakalatnama complete in every respect after expiry of the period of limitation for the appeal—*Md. Qamar v. Md. Salamat*, 28 A.L.J. 394, A.I.R. 1930 All. 112, *Shamshu Nath v. Badri Das*, 43 All. 392, 19 A.L.J. 183, 61 I.C. 410. See also *Ram Rup v. Naik Ram*, A.I.R. 1926 All. 252, 91 I.C. 865; *Ram Lal v. Budho Mal*, 103 I.C. 537, A.I.R. 1927 Lah. 618; *Lokenath v. Sheo Saran*, 102 I.C. 255, A.I.R. 1927 All. 816.

60. Alteration of law :—A new statement or exposition of the law or altering the view of the law by the High Court or the Privy Council is no sufficient cause for excusing the delay—*Mowri v. Soorendra*,

10 W.R. 178; *Amra v. Gajan*, 11 W.R. 130; *Makhan v. Manchand*, 5 B.H.C.R., A.C., 107; *Shama Churn v. Bindaban*, 9 W.R. 181 (F.B.); *Bimola v. Dangoo*, 19 W.R. 189. Thus, the fact that a judgment altering the law has been delivered in another case after the time for appealing or applying for review has passed, is no reason for admitting an appeal or review-petition after time—*Makhan v. Manchand*, 5 B.H.C.R. 107. Where a judgment settling a point of law which arises in a case has been delivered before the decision in that case but not reported till afterwards, that is no reason for granting a review of judgment after the time has expired—*Achuta v. Mammavu*, 10 Mad. 357. Even if an amendment in the law may be a sufficient cause for excusing the delay, it is necessary that the applicant should apply for review of judgment immediately after the Amendment Act is passed. If he makes an inordinate delay (e.g. about 2 months) in filing the application, it cannot be excused—*Gyanaji v. Ningappa*, 52 Bom. 434, A.I.R. 1928 Bom. 308 (310), 111 I.C. 633; *Secretary of State v. Tirath Ram*, 9 Lah. 76, A.I.R. 1928 Lah. 216 (218).

61. Ignorance of law :—See Note 49A under heading “Mistake of law.” The fact that the appellant was a *pardanashin* lady and did not know that a copy of the decree was required to be filed along with the memorandum of appeal is no sufficient cause for extending the time to enable her to file a copy of the decree after the period of limitation—*Masum v. Madan*, 1911 P.W.R. 8, 9 I.C. 222 (223). Ignorance of the effect of the judgment is no justification for delay in filing the review—*Golam v. Syad*, 8 Bom. 260.

62. Poverty :—The poverty of the appellant in consequence of which he was not able to pay court-fees in time and had to raise funds, is not a sufficient cause for admitting an appeal out of time—*Moshaulla v. Ahmedullah*, 13 Cal. 78; *Husaini v. Collector*, 9 All. 655 (F.B.); *Krishnaswamy v. Ramaswamy*, 19 M.L.J. 209; even the state of poverty coupled with the fact of the appellant being a *pardanashin* lady is no sufficient cause—*Husaini v. Collector*, 9 All. 655 (F.B.).

63. Pardanashin lady :—The mere fact of the appellant being a *pardanashin* lady is not a sufficient cause—*Husaini v. Collector*, 9 All. 655 (F.B.); *Masum v. Madan*, 1911 P.W.R. 8, 9 I.C. 222 (223). It may be conceded that when the fact of the appellant being a *pardanashin* lady has prevented her from presenting the appeal herself or from retaining counsel to do so, it may furnish a ground for applying the discretionary power under this section; but it cannot be laid down that whenever the appellant is a *pardanashin* there should be no practical limit to the period during which her appeal must be presented—*Husaini Begum v. Collector*, 9 All. 11 (18) (per Mahmood J.). But where the applicant is a *pardanashin* lady whose legal interests are not prosecuted by her legal advisers with all the carefulness which the circumstances demand, in consequence of which delays have occurred in instituting legal proceedings, such delays ought to be excused—*Bai Nematlu v. Bai Nematullabu*, 42 Bom. 295 (300).

64. Negligence of pleader or his clerk :—*Bona fide* mistake on the part of the pleader may be excused, but want of care and attention on his part in seeing to the proper presentation of the appeal is no sufficient cause. Thus, where the counsel for the appellant had omitted to present his petition of appeal in due time, although he had been furnished with the necessary papers and the necessary costs, *held* that the negligence on the part of the counsel was not a sufficient cause for extension of time—*Buddhu v Dewan*, 37 All 267. Carelessness on the part of the pleader in filing an appeal of value over Rs. 5,000 in the Divisional Judge's Court instead of in the Chief Court is not a sufficient cause for excusing the delay in the subsequent presentation of the appeal to the latter Court—*Sant Singh v Qaim*, 118 P R 1908. Negligence of the vakil in filing proper Court-fee stamps, when the deficiency of stamps in the memorandum of appeal was pointed out to him by the Court, is not a sufficient cause for excusing the delay in filing the proper stamps—*Jodhon Prosad v. Nanku Prosad*, 3 P L J. 484, 46 I.C. 509.

Filing of an appeal in a wrong Court through gross carelessness of the pleader is not a sufficient cause for presenting the appeal to the proper Court after the expiry of the period of limitation—*Mahammad v. Ladha Singh*, 9 P L R. 1914, 23 I C 86. Where the appellant's mukhtar omitted to file his power-of-attorney and the copy of the first Court's judgment with the appeal, and filed them long after the presentation of the appeal, and no reasons were given for the delay, the appeal was dismissed as barred by limitation—*Dhanna v Wazir*, 1919 P L.R. 94, 52 I C. 346. The mere fact that the counsel entrusted with the task of filing an appeal forgot all about it till after the expiry of the period of limitation is not a sufficient cause for extending time—*Dilan v. Ram Bharasay*, 1 O W N. 880, A.I R 1925 Oudh 374, 85 I.C. 693. But where the appellant placed all the necessary papers in the hands of an Advocate at 9-30 a.m. on the last day for filing the appeal, but the Advocate could not examine the papers because of more pressing engagements till his return from Court in the afternoon when he found that the appeal had been time-barred, and thereafter the appeal was filed on the next day, *held* that though it may be said that there was some negligence or want of proper attention on the part of the Advocate in not looking into the papers as soon as they were handed over to him to find out what was the last day for filing the appeal, still as he was then pressed with other engagements and did not know that his client had come on the very last day, there was sufficient cause under this section—*Karali v Apurba*, 34 C.W N 1119 (1126).

Similarly, negligence of the pleader's clerk in applying for delivery of the copy of the decree and in filing the appeal would not be a sufficient cause of delay—*Allahdadshad v Mukhdum*, 24 I.C. 977, 7 S.L.R. 201. Mistake of the pleader's clerk in filing the appeal out of time is no sufficient cause—*Ganesh v Harde Bihari*, A.I R. 1925 Oudh 189, 82 I.C. 484; *Gopal v. Digambar*, 101 I.C. 448, A.I R 1927 Pat. 232. But in a Punjab case, where the appellant's counsel prepared the grounds and gave

them to his clerk 9 days before the expiry of the period of limitation, but the clerk finding that a copy of the judgment of the first Court was wanting directed the client's agent to get the same and kept the appeal by him till the said copy was obtained and then forgot to file the appeal in time, *held* that sufficient cause had been made out though the pleader was not free from blame—*Bibi Putli v. Jawala*, 1912 P.W.R. 126, 16 I.C. 488.

65. Negligence of Appellant :—Where an appellant obtained an uncertified copy of the decree in which the date of the decree was wrongly given, and the appellant's pleader was misled thereby, it was held that there was no sufficient cause of delay in filing an appeal from the decree—*Karachi Trading Co. v. Tejchandras*, 8 S.L.R. 235, 28 I.C. 82. Where an appellant filed an appeal without a copy of the right decree and it was proved that the whole procedure on the appellant's part was slack to the utmost, it was held that this section did not apply—*Gurprasad v. Ram Samajo*, 13 A.L.J. 1101, 31 I.C. 876. Where a copy of the decree, which was in existence at the time of preferring the appeal, was not attached to the memorandum of appeal, *held* that the memorandum was bad, and as no sufficient cause was shown for extending the time under this section, the appeal was dismissed—*Hem Chandra v. Jadab Chandra*, 16 C.L.J. 116, 17 I.C. 99 (100). So also, the presentation of second appeal without a copy of the first Court's judgment is not a proper presentation and time cannot be extended for filing it—*Rajan v. Kuria*, 4 Lah. L.J. 475, 39 P.L.R. 1922, A.I.R. 1923 Lah. 95; *Lakhma Das v. Mehr Chand*, 73 I.C. 910, A.I.R. 1923 Lah. 144. Where the only reason for delay in filing an appeal was that certain necessary papers were given to a counsel who took no steps for filing the appeal and returned them after the period of limitation had expired, and it was not shown that the appellant took any steps to engage the services of another pleader before the expiry of the period of limitation, it was held that there was no sufficient cause for the delay—*Dewan v. Buddhu*, 12 A.L.J. 837, 25 I.C. 30. Where the appeal was filed late on account of the delay in getting copies, and the delay was due to the fact that the appellant gave money to the pleader's clerk for getting the copies but afterwards took no steps to enquire of his pleader for the same, *held* that there was no sufficient cause to excuse the delay—*Mahlab v. Birmo*, 21 A.L.J. 817, 75 I.C. 254.

An appellant who has waited for applying to obtain the necessary copies up to the last day of limitation, when the Court happened to be closed for some holiday, and who was consequently obliged to apply for them after the period for appeal had expired, is not entitled to get either the indulgence under this section or the benefit of section 12—*Guran v. Bindraban*, 79 P.R. 1916, 35 I.C. 233. After the arguments in a case were concluded, but before judgment was pronounced, the defendant died. The case was decided against the defendant. His sons, one of whom was an adult, and the other a minor represented by his mother as guardian, presented an appeal 50 days beyond time. It was held that there was no sufficient reason to extend the delay, in as much as the

adult son (who was an educated young man) and the mother (who was well able to manage her affairs) who were concerned to prosecute the litigation in their own interests and in the interests of the infant, were grossly negligent, remiss and careless in not prosecuting the appeal 'n time—*Babu Ganesh v. Sitaram*, 41 Bom. 15 (20).

When the defendant died in 1918, and the plaintiff applied to have the name of the legal representative of the defendant placed on the record two years after, on the ground that he was ignorant of the defendant's death, held that the plaintiff had failed to show sufficient cause for the delay, for if he had shown the smallest diligence in prosecuting the suit, he must have discovered the fact of the defendant's death much earlier—*Sarat Chandra v. Maihar Stone and Lime Co., Ltd.*, 49 Cal. 62 (at p. 66). Where the clear provisions of the Court Fees Act were brought to the notice of the party's counsel, and he was asked to make up the deficient Court Fees, but the counsel and the party were both grossly negligent in not paying the deficit Court fees within the period of limitation, held that they were not entitled to any extension of time—*Puran Chand v. Emp.*, 27 P.L.R. 91, 92 I.C. 991, A.I.R. 1926 Lah. 343.

Where the appellants relied upon an unauthorised publication known as the 'Legal Diary' and being misled by it as to the duration of the Chief Court's vacation presented his appeal beyond the period of limitation, it was held that the cause shown was not sufficient, as the appellant had not acted with due care and attention—*Jai Dial v. Amar*, 1917 P.W.R. 27, 37 I.C. 828.

66. Negligence of agents or servants :—Negligence of servants is not a sufficient cause. If parties choose to entrust legal affairs (e.g. filing of appeal) to their servants, they must take the consequences of any remissness or negligence which may be exhibited on the part of their servants, and they cannot come to Court after the period of limitation and claim indulgence under this section—*Seth Jahar v. Pritchard*, 4 P.L.J. 381, 52 I.C. 225; *Jaleswar v. Ram Hari*, 55 I.C. 17 (Patna); *Mg. Naw v. Somasundaram*, 2 Rang. 655, A.I.R. 1925 Rang. 187, 85 I.C. 324.

Where an appellant entrusted all business connected with the filing of his appeal to an unqualified man who made no attempt to take professional advice, which if taken would have avoided the delay in the presentation of the appeal, held that it was not a sufficient cause under this section—*Krishnaswami v. Ramaswami*, 19 M.L.J. 209, 1 I.C. 73.

67. Notice of delivery of judgment, not given to parties :—An application for extension of time for appeal was made on the ground that though arguments were heard on the 15th March, judgment was not delivered until 17th April, and no notice of the delivery of judgment was given to the parties, and it was not until July that the applicant heard that judgment had been delivered. Held that in the absence of any indication to the contrary, it must be presumed that the notice required under O. 20, Rule 1, C. P. Code, was given. The application was refused—*Habibullah v. Banarsi Das*, 22 O.C. 379, 55

I C. 837 (838). But in *Ma Me Thin v. Maung San Lun*, 8 Bur. L.T. 99, 27 I.C. 784, no such presumption was made, and the negligence of the Court in not giving notice of delivery of judgment was held to be a sufficient cause for extension of time for the appeal.

68. Other cases :—The fact that the appellant had preferred an appeal in a connected case and awaited its result does not entitle him to an extension of time under this section—*Dund v. Deonandan*, 17 C.L.J. 596, 20 I.C. 513; *Husaini Begum v. Collector*, 9 All. 11 (per Mahmud J.). But see *Tirath Ram v. Municipal Committee, Amritsar*, 27 P.L.R. 841, 96 I.C. 416, A.I.R. 1926 J. 101. The fact that a person was not aware of a change of rule which had been given ample publicity is no ground for excusing delay—*Gopal v. Wallabhdas*, A.I.R. 1925 Nag. 193, 75 I.C. 878. Two suits were brought at the same time by the executors raising some questions of construction in respect of the same will. Similar decisions were passed in both the suits. On appeal by a defendant in one suit the decree of the Court of first instance was reversed. Thereupon the plaintiffs applied for leave to appeal in the second suit, although the time limited for appealing had expired, the Court held that no sufficient cause was shown for the plaintiff's delay; the decision in one suit would not abide by the decision of the other, as the suits were independent of each other—*Thucker v. Canji*, 14 Bom. 365.

Where an application to set aside an *ex parte* decree was dismissed on the merits, as the decree had not been passed *ex parte*, the period occupied in the proceeding would not be deducted in computing the period of limitation for an appeal against the decree. The petitioner having failed in his application could not be allowed to fall back upon the remedy by way of appeal, which was open to him at the time when the decree was passed, and of which he did not choose to avail himself, and that there was no sufficient cause under this section for filing the appeal out of time—*Ardha Chandra v. Matangini*, 23 Cal 325 (327). See also *Ko Tha Lin v. Ko Hla*, 8 Rang. 168, A.I.R. 1930 Rang. 41 (42). But the time taken in prosecuting an application for setting aside an *ex parte* order certifying an adjustment of a decree can be deducted in computing the period of limitation for appealing from the *ex parte* order—*Ghulam Qazam v. Qutbuddin*, 30 P.L.R. 512, A.I.R. 1930 Lah 113 (114), 115 I.C. 467.

If the delay be caused by the appellant's desire to file his appeal on a "lucky day," held that that would be no sufficient cause—*Kichilappa v. Ramanujan*, 25 Mad 166 (177). The goodness or otherwise of a case, and a mistake in calculating the time allowed for an appeal do not in themselves constitute a sufficient cause—*Gharib v. Pohlo Mal*, 92 P.R. 1886.

The plaintiff brought a suit for partition and possession of his share against his co-sharer Z as well as the vendees of the co-sharer. The first Court gave him a decree. Two appeals (Nos 19 and 20) were filed against that decree, one (No. 20) by Z, and the other (No. 19) by the vendees.

The lower Appellate Court accepted the appeals, dismissed the plaintiff's suit, and passed two connected judgments (one of which referred to the other) and two decrees. The plaintiff-appellant preferred a second appeal to the High Court, and filed copies of judgment and decree of Appeal No. 20, but did not file a copy of decree in Appeal No. 19. On preliminary objection by the respondents the appellant prayed for time for filing the copy of the decree in Appeal No. 19. *Held* that no sufficient cause has been shown for extending the time for filing the copy—*Muhammad Din v Zebunnissa*, 3 Lah. 215, A.I.R. 1922 Lah. 390, 77 I.C. 541.

The applicant presented an application for review but the Munsarim declared that it was insufficiently stamped. Thereupon a dispute arose between the party and the Munsarim as to whether or not the stamp was sufficient. Afterwards the deficiency in stamps was paid, but after the period of limitation. *Held* that there was no sufficient cause for excusing the delay in filing a properly stamped application for review. The deficiency should have been made good as soon as the Munsarim pointed it out—*Munro v. Cawnpore Municipal Board*, 12 All. 57.

MISCELLANEOUS :—

69. Withdrawal of appeal—Cross objection :—The withdrawal of an appeal, by which the respondent lost opportunity under the old C. P. Code (1882) of having his cross-objection heard, afforded no sufficient reason for enlarging the time for his preferring a regular appeal as regards his cross-objection—*Chudasama v. Ishwargar*, 16 Bom. 249; *Jafar v. Ranjit*, 17 All. 518; but where it appeared that the respondents would have appealed but for the fact that an appeal by the appellant was already on the file, it was held that the respondents showed sufficient cause for not filing their appeal within time—*Hargovindas v. Jadavahoo*, 23 Bom 692; *Gour Hari v. Premnath*, 9 Cal 738.

But under the new Civil Procedure Code (1908) it is provided in O. XLI, r. 22 (4) that if the original appeal is withdrawn or dismissed for default, the memorandum of objections filed by the respondents may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit. Even where the cross-objections filed by one party were dismissed, without going into the merits of the case, on the ground of their being filed after the dismissal of the appeal, and an appeal was filed by him on the same points as the cross objections, it was held that this appeal was not barred—*Parbhu Dayal v. Murlidhar*, 22 A.L.J. 365, A.I.R. 1924 All 867 (868), 78 I.C. 677.

70. Admission of time-barred appeal subject to objections at the hearing :—An *ex parte* order admitting a time-barred appeal is subject to reconsideration at the hearing of the appeal at the respondent's instance—*Krishnaswami v. Ramaswami*, 41 Mad. 412 (P.C.), affirming 23 M.L.J. 219; *Mashaulla v. Ahmedulla*, 13 Cal. 78; *Sarat Chandra v. Saraswati*, 34 Cal.216; *Dund Bahadur v. Deonandan*, 20 I.C. 513, 17 C.L.J. 296; *Gali v. Rachla*, 13 A.L.J. 635, 29 I.C. 1003; *Saku v. Maroti*, 8 N.L.R. 50, 15 I.C. 562; *Melli Reddy v.*

Beddakka, 27 M.L.J. 147, 25 I.C. 746; *Venkatrayudu v. Nagadu*, 9 Mad. 450; *Ravji Keshav v. Krishna Rao*, 38 Bom. 613; *Mulna Ahmad v. Krishnaji Ganesh*, 14 Bom. 594. The *ex parte* order may be reconsidered either by the Court which admitted the appeal or by the Court to which the appeal has been transferred—*Wahid v. Hagdod*, 1897 A.W.N. 15; *Chunder Dass v. Boshoon Lal*, 8 Cal. 251; *Krishna v. Subraya*, 21 Mad. 228; *Mulna v. Krishnaji*, 14 Bom. 594. A Division Bench of the High Court hearing an appeal is competent to set aside an *ex parte* order of a single Judge of the High Court admitting an appeal beyond time—*Husaini Begum v. Collector*, 9 All. 11; *Umed Ali v. Municipal Committee*, 2 Lah. 1; *Krishnasami v. Ramasami*, 41 Mad. 412 (416) (P.C.).

In the Privy Council case cited above (41 Mad. 412) their Lordships of the Judicial Committee, while holding that an *ex parte* order admitting a time-barred appeal is open to reconsideration at the respondent's instance, yet observed that the question of limitation should not however be left open till the hearing of the appeal, although this has been hitherto the usage in India. The Indian Courts should adopt a procedure which will secure at the stage of admission the final determination of any question of limitation affecting the competency of an appeal. This view has also been expressed in *Shrimant Sundarabai v. Collector*, 43 Bom. 376 (P.C.). See the cases cited under heading "Admitting time-barred appeal subject to objections" in sec. 3.

So, when an application is made to the Court for an extension of time for presentation of an appeal under this section, a rule should be issued on the respondent to show cause why an extension of time should not be granted—*Elahi Newaz v. Bisweswar*, 79 I.C. 924, A.I.R. 1925 Cal. 175. This procedure has been insisted upon by their Lordships of the Judicial Committee in 41 Mad. 412 cited above. Where an appeal which was filed out of time was admitted subject to objections, but the respondent was not made aware of the order and no question was raised as to the legality or propriety of the order, and the appeal was allowed on the merits by the lower Appellate Court, held that the admission of the appeal subject to objections by the Lower Appellate Court was irregular, and the respondent could raise the question of limitation in second appeal—*Abdul Kasem v. Chaturbhuj*, 3 P.L.T. 110, 64 I.C. 55, A.I.R. 1922 Pat. 47. If an appeal presented out of time is admitted by the appellate Court *ex parte*, the respondent as soon as he is served with notice of the appeal may apply by motion for dismissal of the appeal on the ground of delay. If the respondent sleeps over his right and allows the appellant to incur expenses in bringing the case for hearing, he cannot be allowed at the hearing of the appeal to raise a preliminary objection that the appeal is time-barred—*Murugappa v. Thyammal*, 31 M.L.T. 456, 70 I.C. 827, A.I.R. 1923 Mad. 82.

Where a Judge excused the delay in the filing of an appeal without notice to the respondent, and when the appeal came on for hearing, the latter did not object to the order in the course of his argument, the final decision in the appeal cannot be attacked in revision on the ground

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Narain Singh v. Bikram, 8 A.L.J. 793, 11 I.C. 814. Where a Judge who purports to exercise the discretion under this section does so under the view that there is no general rule when in fact there is one, he has misdirected himself as to the law to be applied to the case; he has not exercised a judicial discretion and the superior Court must either remit the case or exercise the discretion itself—*Brij Indar Singh v. Kanshi Ram*, 45 Cal. 94 (P.C.). Where the Lower Appellate Court has failed to exercise its discretion according to this section and has not considered the question whether there was sufficient cause for extending the period, the High Court may interfere and consider the question in second appeal, and if necessary allow a time-barred appeal—*Ghorib v. Pohlo Mal*, 92 P.R. 1886; *Nand Singh v. Gulli*, 77 P.R. 1917, 42 I.C. 343; *Sripat v. Hubdar*, 2 O.W.N. 678, A.I.R. 1925 Oudh 643, 90 I.C. 115; *Lal Bhan Pratab v. Rajab*, 6 O.W.N. 1035, A.I.R. 1930 Oudh. 184.

But where the Lower Court after considering all the circumstances of the case has exercised its discretion one way or the other, and has come to the conclusion that sufficient cause has or has not been established for not filing an appeal within time, the High Court in second appeal will not interfere—*Debi Charan v. Sheikh Mehdi*, 20 C.W.N. 1303, 1 P.L.J. 485; *Fatima v. Hansi*, 9 All. 244; *Hardhan v. Mam Chand*, 92 P.R. 1916, 36 I.C. 614; *Tulsa Kunwar v. Gajraj*, 25 All. 71; *Hamid Ali v. Gayadin*, 26 All. 327; *Sripat v. Hubdar*, (supra); *Abdul Kasim v. Chaturbhuj*, 6 P.L.J. 444, 64 I.C. 55; *Ram Rup v. Naik Ram*, 91 I.C. 865, A.I.R. 1926 All. 252; *Malak Md. Khan v. Het Ram*, 28 P.L.R. 257, 103 I.C. 90.

A mere difference in view as to the mode in which the discretion ought to have been exercised under this section by the Lower Appellate Court, is in itself no ground for interference by the High Court; but where facts which are material for the purpose of enabling the Lower Appellate Court to exercise the discretion under this section have not been considered, the exercise of discretion is judicially unsound and the High Court can interfere—*Kichilappa v. Ramanujam*, 25 Mad. 166; *Hardhan v. Mamchand*, 92 P.R. 1916, 36 I.C. 614. Before the High Court interferes, it ought to be satisfied that the exercise of the discretion by the lower Court was judicially unsound. The test is, has the discretion been exercised after appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion, and after the application of the right principle to these facts?—*Kichilappa v. Ramanujam*, 25 Mad. 166. Where the Lower Appellate Court has in the exercise of its judicial discretion refused to excuse the delay in the presentation of an appeal, the High Court would not interfere in second appeal with the exercise of that discretion even though it might have taken another view, had it been the Lower Appellate Court—*Ahmad Hussain v. Fasihullah*, 45 All. 432, 21 A.L.J. 319, A.I.R. 1923 All. 455, 74 I.C. 1039. In a recent Madras case, where the Lower Appellate Court had admitted a time-barred criminal appeal and acquitted the accused, without being satisfied that the appellant had sufficient cause

the death, as would otherwise have been allowed from the time so prescribed.

(4) Where such representative is at the date of the death affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.

Illustrations.

(a) The right to sue for the hire of a boat accrues to A during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority

(b) A right to sue accrues to Z during his minority. After the accruer, but while Z is still a minor, he becomes insane. Time runs against Z from the date when his insanity and minority cease

(c) A right to sue accrues to X during his minority. X dies before attaining majority, and is succeeded by Y, his minor son. Time runs against Y from the date of his attaining majority.

73. Principle :—"The rights of infants are much favoured in law, and regularly their laches shall not be prejudicial to them, upon a presumption that they understand not their right and that they are not capable of taking notice of the rules of law so as to be able to apply them to their advantage. Hence, by the common law, infants were not bound for want of claim and entry within a year and a day, nor are they bound by a fine and five years' non-claim, nor by statutes of limitation, provided they prosecute their right within the time allowed by the statute after the impediment is removed"—Bacon's Abridgment, cited in 37 Mad. 186 (at p. 190). The general principle of law is that time does not run against a minor—*Moro v. Visaji*, 16 Bom. 536.

74. Scope of Section :—Sec. 7 of the old Act applied to the case of a person entitled to make any application, but now this section has been limited to the case of a person entitled to make only an application for the execution of a decree

But it was held in an earlier Calcutta case that a right preserved by the old Act would not be taken away by the new one. Thus, under the Act of 1877, the minor judgment-debtor could on attaining majority apply to set aside a sale. If such right accrued to a minor in 1903 before the Limitation Act 1908 came into force, it could not be taken away by the present Act, that being a privilege which has been preserved by sec 6 (c) of the General Clauses Act, and the application made in January 1909 was not barred—*Fazal Karim v. Annada*, 15 C.W.N. 845 (847), 11 I.C. 401. But the correctness of this ruling has been doubted in a recent Calcutta case where their Lordships observed that no one has a vested right in any course of procedure, that an application made after the present Act came into force would be governed by the present Act and not by the old one, that in spite of the passing of the new Act, the applicant had enough time to apply under the new Act but he did

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73. Principle :—"The rights of infants are much favoured in law, and regularly their laches shall not be prejudicial to them, upon a presumption that they understand not their right and that they are not capable of taking notice of the rules of law so as to be able to apply them to their advantage. Hence, by the common law, infants were not bound for want of claim and entry within a year and a day, nor are they bound by a fine and five years' non-claim, nor by statutes of limitation, provided they prosecute their right within the time allowed by the statute after the impediment is removed"—Bacon's Abridgment, cited in 37 Mad 186 (at p 190). The general principle of law is that time does not run against a minor—*Moro v. Visaji*, 16 Bom 536

74. Scope of Section :—Sec. 7 of the old Act applied to the case of a person entitled to make any application, but now this section has been limited to the case of a person entitled to make only an application for the execution of a decree.

But it was held in an earlier Calcutta case that a right preserved by the old Act would not be taken away by the new one. Thus, under the Act of 1877, the minor judgment-debtor could on attaining majority apply to set aside a sale. If such right accrued to a minor in 1903 before the Limitation Act 1908 came into force, it could not be taken away by the present Act, that being a privilege which has been preserved by sec. 6 (c) of the General Clauses Act, and the application made in January 1909 was not barred—*Fazal Karim v. Annada*, 15 C.W.N 845 (847), 11 I.C. 401. But the correctness of this ruling has been doubted in a recent Calcutta case where their Lordships observed that no one has a vested right in any course of procedure, that an application made after the present Act came into force would be governed by the present Act and not by the old one, that in spite of the passing of the new Act, the applicant had enough time to apply under the new Act but he did

cause of action accrued (i.e., when the alienee took possession, Art. 126). He is entitled to take advantage of an existing cause of action so long as it subsists but he does not obtain a fresh period of 21 years (18 years and 3 years under sec. 9) from the date of his birth—*Dhanraj v. Ram Naresh*, A.I.R. 1924 All. 912, 79 I.C. 1019; *Thakur Prasad v. Gulab*, 87 I.C. 662; *Ram Kishen v. Baldeo*, 86 I.C. 704, A.I.R. 1925 All. 247. This view is now fortified by the Privy Council decision in *Ranodip v. Parameshwar*, 47 All. 165, 29 C.W.N. 666, 27 Bom L.R. 175, 23 A.L.J. 176, 48 M.L.J. 29, 86 I.C. 249, A.I.R. 1925 P.C. 33

But the law is otherwise in the case of reversioners. One reversioner does not derive his title through another; and the cause of action accrues to one reversioner independently of others. Therefore, where a nearer reversioner has neglected to sue for a declaration that an alienation made by the widow is not binding on the estate, and has therefore allowed the claim to be barred, a more remote reversioner who was born after the date of the alienation, or who was a minor at the date of the alienation, is not precluded from claiming the benefit of this section; for although the cause of action to the nearer reversioner accrued from the date of alienation, still to him (the remote reversioner) it accrued when he was born or when he was a minor, and not before, and he can enforce his right within three years after he attains majority—*Abinash v. Harinath*, 32 Cal 62 (71); *Bhagvanta v. Sukhi*, 22 All 33 (P.B.); *Das Ram v. Tirtha Nath*, 51 Cal 101 (108). See also *Harak Chand v. Bejoy Chand*, 9 C.W.N. 795 (801). This was also the view of the Madras High Court in *Govinda v. Thayammal*, 28 Mad. 57; *Narayana v. Rama*, 38 Mad. 396, and *Venkata Row v. Tulja Ram Row*, 1917 M.W.N. 30 (36), 38 I.C. 270, but all these cases have now been overruled by the Full Bench decision in *Varamma v. Gopaladasayya*, 41 Mad. 659. In this case it has been held that if the reversioners existing at the time of alienation are barred, the reversioners born thereafter are equally barred, as the cause of action is but one. The Lahore High Court likewise holds (following 41 Mad 659) that the right to sue for a declaratory decree is vested in the whole body of reversioners in existence at the time of alienation jointly and severally, and time begins to run simultaneously against them all, and a reversioner born after the date of alienation does not obtain a fresh cause of action from his birth; because when the time has once begun to run, no subsequent disability stops it—*Chiragh Din v. Abdulla*, 6 Lah, 405, 90 I.C. 1022, A.I.R. 1925 Lah 654. A reversioner born after an alienation has been made, can contest its validity if the period of limitation had not expired before the date of his birth, and his suit is brought within the period prescribed by law. He cannot, if born after the cause of action has already accrued and time begun to run, claim an extension of time under this section—*Umra v. Ghulam*, 22 P.R. 1907; *Inayat Khan v. Shabu*, 108 P.L.R. 1907.

Bond or pro-note taken in the name of minor:—If a promissory note is taken in the name of the minor alone, the minor would have three years from attaining his majority within which to sue. Thus, where through the instrumentality of the guardian of a minor a bond was

obtained in the name of the minor, time did not begin to run against the minor until the latter attained his majority—*Yeknath v. Waman*, 10 Bom. 241. Where any Court is of opinion, on the construction of the document in question, that it is taken in the name of a minor, or in the name of a minor acting by his guardian, then the minor has got three years from attaining his majority within which to bring his suit on the document. But if on the other hand, the Court is of opinion that the document is taken solely by the guardian, then that extended period would not be open for the benefit of the minor—*Pandharinath v. Ajamkha*, 50 Bom 831, 28 Bom L.R. 1431, A.I.R. 1927 Bom. 61, 100 I.C. 95. Where the bond or pro-note is taken in the name of the guardian, the minor cannot on attaining majority claim the benefit of this section. Thus, a promissory note was given to the guardian of the plaintiff when the latter was a minor, in 1906. The plaintiff attained majority in 1919 and sued on the note within three years therefrom. Held that the suit was barred. The pro-note having been given to the guardian, he was the person entitled to sue on it, and not the minor, and the suit would be barred if it was not brought within the ordinary period of limitation. The minor was not entitled to institute a suit on the note—*Vishnu v. Keshav*, 26 Bom. L.R. 426, A.I.R. 1924 Bom. 468, 80 I.C. 474; *Ramanuja v. Sadagopa*, 28 Mad. 205.

79. Adopted son.—In case of an adoption by a widow after her husband's death under authority from her husband, the right of the adopted son accrues from the time when he is adopted, and does not relate back to the death of the adoptive father (although by a legal fiction the adopted son is considered to have taken his birth in the adoptive family at the time of the adoptive father's death)—*Harek Chand v. Bejoy Chand Mahatab*, 9 C.W.N. 795 (798); *Lakhmana v. Lakshmi*, 4 Mad. 160. If he is a minor at the time of adoption, he is entitled to the benefit of this section. Even where a cause of action accrued to a minor Hindu widow and then the widow adopted a son during her minority, the cause of action for the adopted son (a minor) accrued when he was adopted and not before, and in bringing a suit he is entitled to the benefit of this section—*Harek Chand v. Bejoy Chand*, 9 C.W.N. 795 (801).

80. Minor:—'Minor' means a person who has not attained the age of majority under the Indian Majority Act. Section 3 of that Act lays down: "Every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice and every minor under the jurisdiction of any Court of Wards, shall be deemed to have attained his majority when he shall have completed the age of twenty-one years and not before; every other person shall be deemed to have attained his majority when he shall have completed the age of eighteen years, and not before."

If the minor claims the benefit of this section, it is for him to establish affirmatively and clearly that he is under the age of 21 (18+3 years under sec. 8) at the time of institution of the suit; it is not enough merely to show that he is probably under that age at the time—*Charanjit v. Bishan*

Singh, 167 P.L.R. 1914, 23 I.C. 462. See also *Panchu Mandal v. Sheikh Isaf*, 17 C.W.N. 667, 18 I.C. 391; *Prem Das v. Sarbanand*, A.I.R. 1923 Lah. 41. He will have to prove that his suit is within time, if the date of attaining majority is disputed—*Pralhad v. Ramsaran*, 38 C.L.J. 213, A.I.R. 1924 Cal 420.

Medical evidence is not of any help to prove the age of the minor for the purpose of limitation, because it is based on conjectures only, and cannot give the exact age with precision. In cases where limitation is pleaded in defence, a difference of even a single day decides the fate of the case one way or the other, and no Doctor, however competent he may be, can give the precise age of a person so as to determine the exact age of his birth—*Zinda v. Roshnai*, 10 Lah. L.J. 183, A.I.R. 1928 Lah. 250 (252).

A person who is of full age but whose property is under the Court of Wards, cannot take the benefit of this section—*Uma Kanta v. Hiratal*, 20 C.W.N. 852 (854), 34 I.C. 86.

An idol is not a perpetual minor for the purpose of this section; and so it is not correct to say that a suit by an idol to set aside an improper alienation made by the shebait would be for ever saved from the bar of limitation under the provisions of this section. Therefore where the manager of the temple alienated the property of the idol in 1905, a suit brought in 1918 to avoid the transfer was barred—*Chitar Mal v. Panchu Lal*, 48 All 348, 24 A.L.J. 351, 93 I.C. 652, A.I.R. 1926 All. 392.

81. Assignees of minor :—This section gives only a personal privilege to the minor; it applies to the minor himself or his legal representatives but not to his assignees—*Rudra Kant v. Nobokishore*, 9 Cal. 663 (F.B.); *Bhagaban v. Ishan*, 22 C.W.N. 831, 46 I.C. 802; *Mahadev v. Babi*, 26 Bom 730; *Imam-uddin v. Mumtazunnissa*, 18 O.C. 34, 1 O.L.J. 247, 27 I.C. 118; *Mahomed Nur Khan v. Lachmi Naran*, 9 O.L.J. 88, 66 I.C. 101, A.I.R. 1922 Oudh 31; *Hukam v. Shahab*, 1918 P.W.R. 14, 44 I.C. 890; *Rangaswami v. Thangavelu*, 42 Mad 637, *Sitla Bux v. Ram Newaz*, 2 O.W.N. 811, A.I.R. 1926 Oudh 20, 90 I.C. 741. Therefore, where a person sues to set aside a transfer effected by his father during his minority, within three years of his attaining majority and joins with him as co-plaintiff an assignee to whom he sells a portion of the property in suit, that person may be in time by making use of sec. 6 but his co-plaintiff being only an assignee is not entitled to its privilege, and is beyond time—*Sitla Bux v. Ram Newaz*, (supra).

82. Suit or application by minor during minority :—The benefit of this section is not absolute; the plaintiff or applicant labouring under the disability is not bound to wait till the disability ceases; he has the option either to take proceedings through his guardian or next friend, or to wait until the expiration of the period of his minority. The minor can bring a suit or make an application during his minority by his next friend, and can claim the benefit of this section—*Phoolbas v. Lalla Jogeswar*, 1 Cal. 226 (243) (P.C.); *Bhagwanta v. Sukhi*, 22 All. 33 (42) (F.B.); *Vecrayya v. Gangamma*, 36 Mad. 570 (572); *Lalit Mohun*

v. Janoky, 20 Cal 714 (716); *Padma Madho v. Ghanaya*, 30 P.L.R. 398, A.I.R. 1929 Lah. 661 (662). Even if during his minority he makes applications for execution through his guardian, he is not precluded from making applications himself after attaining majority—*Mon Mohun v. Ganga Soondery*, 9 Cal. 181; *Moro v. Visaji*, 16 Bom. 536; *Jagjivan v. Hasan*, 7 Bom. 179; *Zamir Hassan v. Sundar*, 22 All. 199 (F.B.); *Guneswar v. Jagadhatri*, 3 C.W.N. 24. Similarly, the fact that a guardian or next friend might have maintained a suit on behalf of a minor does not take away from the minor the privilege of this section—*Jagadindra v. Hemanta*, 32 Cal. 129 (142) (P.C.); *Jagat Narain v. Narbada*, 16 O.C. 206, 21 I.C. 365.

83. Suit by guardian:—The privilege given to a minor is not one that could be availed of by *him only*, after he comes of age. Any application or act made or done by his *guardian* on his behalf during his minority is equally exempt from the operation of limitation—*Norendra v. Bhupendra*, 23 Cal. 374 (388). Therefore, while the minor's disability lasts, his guardian or next friend can bring a suit or make an application, even though the ordinary period of limitation for such suit or application has run out.

Acknowledgment made to a minor:—See *Venkataramayyar v. Kothandaramayyar*, 13 Mad. 135 cited in Note 187 under sec. 19

84. Insanity.—A state of great mental weakness on account of serious bodily injury caused by an inhuman assault (throwing sulphuric acid on the face resulting in loss of one eye) is not a state of insanity within the meaning of this section. To hold so would be straining the language beyond reasonable limit—*Abdulla v. Abdulla*, 25 Bom. L.R. 1333, A.I.R. 1924 Bom. 290. When insanity is once proved to have existed, it is presumed to continue until it is proved to have ceased; and a very strict burden of proof lies on the party who alleges recovery.—*Pope on Lunacy*, 2nd Edn., p. 408. A lucid interval is a temporary cessation of lunacy and it cannot be treated as a recovery unless it is of sufficient length of time to enable the person to do an intended rational act—*Cartwright v. Cartwright*, 1 Phillim. 90 (100).

85. Other disqualifications:—Under the Limitation Act, no other disqualification than those mentioned in the Act can save limitation, and the only disqualifications that sections 6, 8 and 9 of the Act recognise are minority, idioey and lunacy. A disqualification under the Court of Wards Act is not such a legal disability as is recognised and enumerated in the Act, and the fact that the plaintiff was a disqualified proprietor, whose estate was under the charge of the Court of Wards, is not a ground for extension of the period under this section—*Kusumai v. Wasif*, 19 C.W.N. 1103, 28 I.C. 818; *Rani Kusar Mari v. Nawab of Murshidabad*, 46 Cal. 604 (P.C.), 23 C.W.N. 531, 50 I.C. 202; *Umaakanta v. Hira Lal*, 20 C.W.N. 852 (854), 34 I.C. 86.

The fact that an adopted son on attaining his majority had to sue to establish his adoption is not a disability, and he cannot be allowed the time which was occupied in establishing his rights. Although his rights

were disputed, he still could have sued in the meantime to recover property which devolved on him by virtue of his adoption—*Muddon Mohun v. Nund Kishore*, 5 W.R. 295.

A reversioner's disability to sue for possession while a Hindu female is the owner in possession of the estate is not treated by the Legislature on the same footing as the disability of a minor, an idiot or an insane person; and no extra period can be allowed from the time when he succeeds to the estate—*Sesha Naidu v. Periasami*, 44 Mad. 951 (1952)

85A. Subsection (2) —Where several disabilities co-exist concurrently in the plaintiff, the time does not commence to run against him till all have ceased—*Stuart v. Mellish*, (1742) 2 Atk. 610. If the plaintiff is under one disability at the time the action accrues, and afterwards (and while the first disability continues) he comes under another disability, the time will not commence to run till the last of the disabilities has ceased—*Borrows v. Ellison*, (1871) L.R. 6 Ex. 128

Subsection (3) —Reading sub-section (3) of this section with section 8, the conclusion is that in a suit for possession, where a minor dies before attaining majority, his representatives would have either the total period of 12 years from the date of accrual of the cause of action, or three years from the date of the minor's death, whichever is greater. Thus, a minor died in 1910; the cause of action for a suit for possession had accrued to the minor in January 1909; the 12 years' period from this date expired in January 1921. The period between 1910 and January 1921 being more than three years, the legal representative would be entitled to sue within January 1921. If the legal representative was himself a minor, the rule in subsection (4) would apply—*Anantoo v. Ramrup*, 87 I.C. 315, A.I.R. 1925 All 692.

Subsection (4) :—This subsection contemplates a case in which an extension in favour of one person may be tacked on to an extension in favour of a second person. Such a case arises only where the first person dies while still under a disability and the second person is his *legal representative* who is also a minor at the time of the first person's death—*Lachman Das v. Sundar*, 1 Lah 558 (560), 59 I.C. 678.

7. Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Disability of one of several plaintiffs or applicants.

Illustrations

(a) A incurs a debt to a firm of which B, C and D are partners. B is insane, and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C and D.

(b) A incurs a debt to a firm of which E, F and G are partners. E and F are insane, and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.

This section corresponds to section 2 of the Act of 1877.

86. Sections 6 and 7 :—Sections 6 and 7 are not mutually exclusive; the latter section supplements the former—*Path Sam v. Jhedar*, 41 All 435 (441), 17 A.L.J. 669. In other words, the right which the previous section gives to a minor (viz. to wait till he attains majority) can be availed of by him only if the circumstances mentioned in the first portion of the present section do not exist, that is, if there is nobody to give a valid discharge on his behalf without his concurrence. If however a discharge can be given without his concurrence, he cannot take advantage of his minority and wait till he becomes a major.

The combined effect of sections 6 and 7, in cases in which a right of suit resides jointly in a plurality of persons, is that where any one of such joint creditors or claimants is under a disability and a full discharge can be given without his concurrence by all or any of the others, the suit on the claim will be governed by the ordinary law of limitation, and time will run against all; but where no such discharge can be given, time will not run against any of them until all have ceased to be under disability. In the result, such a suit cannot be barred in part in respect of some of the joint claimants, and not-barred in part at the same time in respect of the others—*Ahinsa Bibi v. Abdul Kader*, 25 Mad. 20 (38).

87. Joint right :—This section speaks of a "joint" right, and has no application where the plaintiffs are severally entitled to the right. Where several persons jointly entitled to a certain property are dispossessed and a suit is brought for the recovery of possession, this section has no application to the case, if each individual plaintiff is entitled to bring the suit for possession of his individual share—*Rakhal Chandra v. Mohendra*, 51 I.C. 797 (Cal.). The right to recover the dower of a Mahomedan lady descends to her heirs, but the position of the sons as regards their right to the dower-debt is not that of joint tenants but of tenants-in-common, especially where the right to recover the dower debt is inherited in part by the debtor himself (the lady's husband). This section does not apply to the case—*Md. Zahur v. Maimuna*, 27 A.L.J. 284, A.I.R. 1929 All. 142 (144). Moreover, this section contemplates that the joint claimants or creditors are persons whose substantive right is joint, i.e., where more than one individual possess the same identical substantive right. Persons whose rights are distinct and different but who are permitted to enforce such separate rights by one judicial process to which all are parties, or by a process instituted by one on behalf of all (e.g., persons entitled to compensation under the Fatal Accidents Act) are not

comprehended by this section—*Johnson v. The Madras Ry. Co.*, 28 Mad. 479 (485) ; see also *Harihar v. Bholi*, 6 C.L.J. 383. Thus, the mere fact that a person suing for himself and praying for one particular remedy (setting aside a sale-deed) could have joined in the same suit another cause of action (claim for possession) vested in another person for whom the former could have acted as next friend, would not bring such a suit within the ambit of section 7, which contemplates the existence of a joint cause of action in support of a single suit—*Kandasami v. Irusappa*, 41 Mad. 102 (107), 33 M.L.J. 309, 40 I.C. 664.

88. Discharge :—This section applies only to cases where the joint debt or claim is of such a character that a *discharge* can be given by one creditor or claimant without the concurrence of others. This section does not apply where the debt or claim, *though joint*, is of such a character that a single creditor or claimant *cannot give a discharge* so as to bind the others. The test to be applied is, whether it is the intention of the parties that each of the persons in whose favour the obligation is created is a creditor for the whole ; if so, a payment to one liberates the debtor against all the creditors ; if not, each is a creditor for his own share and cannot give a discharge for the whole obligation—*Harihar v. Bholi*, 6 C.L.J. 383.

89. Muhammedan Co-heirs :—In a Muhammedan family, the heirs are entitled to definite shares as tenants in common ; and the cause of action of such heirs cannot be said to be a *joint* one for the purpose of limitation. One co-heir cannot give a valid discharge to bind other co-heirs—*Alla Pichai v. Pappathammal*, 36 M.L.J. 184, 51 I.C. 748 ; *Ahinsa Bibi v. Abdul Kader*, 25 Mad. 26 (39).

Co-partners :—The two illustrations show that one of several co-partners can give a valid discharge without the concurrence of others.

Reversioners :—Section 7 does not apply to the case of reversioners. The whole body of reversioners cannot give a discharge, or, in other words, cannot declare (e.g.) that an alienation is valid. No doubt if they join in or agree to the alienation, it may be evidence of the alienation being for purposes which could bind the reversion, but they as a body cannot declare that an alienation is valid—*Neelakantamier v. Chinnu Ammal*, 52 M.L.J. 13, A.I.R. 1927 Mad. 216, 99 I.C. 668.

90. Co-obligees :—In the case of co-obligees of a money-bond, in the absence of anything to the contrary, the presumption of law is that they are entitled to the debt in equal shares as tenants-in-common, and the major co-obligee cannot give a discharge on behalf of the minor. Hence, where one of two co-obligees is a minor, limitation will run against the other co-obligee who is not a minor in respect of that portion of the debt to which he is entitled, and this section does not affect the case—*Manzur v. Mahmudunnissa*, 25 All. 155, following *Steeds v. Steeds*, (1889) 22 Q.B.D. 537.

91. Co-trustees :—One of several co-trustees can give a valid discharge without the concurrence of others. Therefore where an adult

joint trustee takes no steps to protect the trust and his right to take steps becomes barred, the rights of the other joint trustees, even though minors, become time-barred—*Thiyagaraja v. Ratnasabapathi*, 34 Mad. 284 (287), 20 M.L.J. 421, 6 I.C. 992.

92. Co-mortgagors :—The right to redeem is an indivisible right, and one mortgagor cannot give a valid discharge without the concurrence of the other co-mortgagors. In 1895, the plaintiff's father (a Mahomedan) mortgaged his property to the defendants. After the death of the mortgagor, his widow sold the equity of redemption to the mortgagees in 1901 and placed them in possession of the property although she was entitled to only an eighth share in it. At that time one of the mortgagor's daughters (plaintiff no. 3) had attained majority and his son (plaintiff no. 1) did so in 1908. The youngest daughter (plaintiff no. 2) attained majority in 1913. These three plaintiffs who owned the remaining seven shares sued in 1914 to redeem the mortgage and recover possession of the property from the defendants; the lower Court held that the suit was barred as regards plaintiffs nos 1 and 3 under Art. 144 read with sec. 6. The High Court held that the right to redeem was an indivisible right, and neither of the plaintiffs who attained majority more than three years before the date of the suit was qualified to discharge or redeem the mortgage, and the suit having been brought within three years from the date when the youngest plaintiff attained majority was within time under this section—*Gulam Goss v. Shriram Pandurang*, 43 Bom 487 (491), 21 Bom.L.R. 353, 51 I.C. 79, *Bai Keval v. Modhu Kala*, 46 Bom. 535, 23 Bom L.R. 1191, 64 I.C. 972, A.I.R. 1922 Bom 319.

Bom.L.R. 851. But the other High Courts are of opinion that in a Hindu family consisting of brothers, the elder brother must be deemed to be the managing member of the family, and can give a discharge on behalf of the minor brothers—*Doraisami v. Nondisami*, 38 Mad. 118 (F.B.), 25 M.L.J. 405, 21 I.C. 410; *Mahableswar v. Ramchandra*, 38 Bom. 94, 15 Bom.L.R. 882, 21 I.C. 350; *Bapu Tatya v. Bala Ravji*, 45 Bom. 446, 22 Bom.L.R. 1383, (dissenting from 31 All. 156); *Kuppusami v. Kamalammal*, 43 Mad. 842, *Sarayya v. Subbamma*, A.I.R. 1928 Mad. 42, 53 M.L.J. 677; and this view has now been adopted by the Allahabad High Court also in the cases of *Rati Ram v. Niadar*, 41 All. 435 and *Shiamlal v. Moolchand*, 87 I.C. 177, A.I.R. 1925 All. 672.

In a joint *Dayabhaga* Hindu family of brothers, the eldest brother cannot give a valid discharge to bind his minor younger brothers—*Nabin Chandra v. Chandra Madhab*, 44 Cal. 1 (9) (P.C.); *Jugal Kishori v. Butto Kristo*, 55 Cal. 608, 32 C.W.N. 192 (195).

Where the father or the managing member of a joint Hindu family is also appointed as the guardian *ad litem* of the minor members, the powers of the father are controlled by the provisions of O 32, r. 6, C. P. Code, and he cannot, without leave of the Court, do any act in his capacity as father or managing member of the joint family which he is debarred from doing as guardian *ad litem*. He therefore cannot give a valid discharge on behalf of the minor members of the family without the leave of the Court—*Ganesha Row v. Tulja Ram Row*, 36 Mad 295 (303) (P.C.).

94. * Guardian :—The natural or lawful guardian can give a valid discharge on behalf of his ward. Thus, where a rent decree was obtained by an adult plaintiff and three minors who were described in the plaint as suing through the adult plaintiff as their guardian, it was held that the adult plaintiff being entitled to obtain the decretal amount and give a valid discharge, the matter came directly under this section, and the minor plaintiffs are not protected by the provisions of section 6 and cannot wait till majority—*Bholanand v. Padmanand*, 6 C.W.N. 348 (351).

But a *de facto* guardian (e.g. a mother according to the Mahomedan law) is not the lawful guardian of the property of the minor, and cannot therefore give a valid discharge—*Amina Bibi v. Bama Shankar*, 41 All. 473.

95. Decree-holders .—Section 8 of the Act of 1877 (corresponding to the present section) used the words "joint creditors and claimants" and did not apply at all to joint *decree-holders*. The reason was, that this section was held to be applicable only to those cases where the act of the joint owner was *per se* a valid discharge, and since the discharge of a judgment-debtor's liability was always given by the order of the Court and never by the mere act of the decree-holder, this section was not applicable to decree-holders. See *Sesha v. Rajagopala*, 13 Mad. 236; *Narayanan v. Damodaram*, 17 Mad. 189; *Govindram v. Tata*, 20 Bom 383; *Zamir Hasan v. Sundar*, 22 All. 199 (F.B.); *Surya Kumar v. Arun Chunder*, 28 Cal. 465; *Periasami v. Krishna Ayyan*, 25 Mad. 431.

Now, by reason of the express words "application for the execution of a decree" the provisions of the present section apply to joint decree-holders, wherever one of them can act in the matter on his own authority without the concurrence of the others. Such a case arises, for instance, where the joint decree-holders are brothers in a joint Hindu family, some of whom are minors, in such a case the adult brother representing the entire family can execute the decree on behalf of himself and the minor brothers, and can give a valid discharge on behalf of all the minor brothers—*Rati Ram v Niadar*, 41 All 435 (440), 17 A.L.J. 649, 49 I.C. 990; *Shyam Lal v Mool Chand*, A I R 1925 All. 672, 87 I.C. 177. The manager of a joint Hindu family can give a valid discharge without the concurrence of the minor members in the case of an application to execute a decree, just as he can in the case of a suit, and the mere fact that one of the members is a minor will not prevent time running against all the members of the family—*Supdu v. Sakharani*, 52 Bom. 441, A I R 1929 Bom. 13, 30 Bom L.R. 537. In cases in which there are a number of decree-holders, members of one and the same family, one of whom happens to be a minor, it is not open to the remaining decree-holders to remain quiescent for a period which might extend to 18 or 20 years, and then to put forward the said minor, after he had attained majority, to execute the whole decree for their benefit as well as his own—*Rati Ram v Niadar* (supra). If, however, the adult decree-holder is not competent to give a discharge on behalf of the minor as his own—*Rati Ram v. Niadar* (supra). If, however, the adult decree-holder does not purport to act as the manager of the joint family of which the minor decree-holders are members, time does not begin to run until all the minor decree-holders attain majority—*Jugal Kishori v Butto Kristo*, 55 Cal. 608, 32 C.W.N. 192 (195). Where a suit for possession of land was instituted by the widow of a deceased brother and a minor brother, *held* that the plaintiffs' interests were distinct and separate, although a joint decree was passed, and that the widow was not entitled to give a valid discharge on behalf of the minor, and that limitation did not begin to run against the minor until he attained majority—*Chiranji v. Ram Sarup*, 27 A.L.J. 72, A.I.R. 1929 All. 267, 118 I.C. 229.

A decree was obtained in 1913 by a father and his three minor sons, and the three sons were described in the proceedings as suing through their next friend and guardian, viz., the first plaintiff (father). The father died before execution; the eldest son attained majority in 1914 and applied for execution of the decree in 1917 (within three years of his attaining majority). It was contended that the application for execution was time-barred, in as much as the father became entitled to give a good discharge on behalf of his minor sons as soon as the decree was passed in 1913, and time ran from that date. *Held* that as the father was acting not merely as the manager of the family, but also as the next friend or guardian of the minor sons, his powers were controlled by the provisions of O. 32, r. 6 of the C. P. Code, and he could not do any act in his capacity as father or managing member which he

was debarred from doing as a next friend or guardian without leave of the Court. That is, the father could not give a good discharge without the consent of the Court in which the decree had been obtained. And as the father died before applying for execution, he had never been in a position to give a good and legal discharge. Time would begin to run from the date when the respective disabilities of the minors would cease—*Lakshmanan v. Subbiah*, 47 Mad. 920, 47 M.L.J. 389, 82 I.C. 785, A.I.R. 1925 Mad. 78 (following *Ganesha Row v. Tulja Ram Row*, 36 Mad. 295 (P.C.)). During the pendency of a suit, the plaintiff (a Mahomedan) died. Succession certificate was applied for, and was granted to five persons, viz., the widow and four sons of the original plaintiff; of these sons one H was a major and the other three were described as minors represented by their adult brother H as guardian. A bond was taken from H, to secure the interests of the minors. These five persons were brought on the record and a decree was passed in 1913 in their names. Held that the adult decree-holder H was competent, by reason of this certificate, to give a valid discharge to the judgment-debtors. An application for execution made in 1920 was therefore barred, and limitation was not saved by the fact that some of the decree-holders were still minors—*Bilwar Bibi v. Habibar*, 51 Cal. 566, A.I.R. 1924 Cal. 710, 84 I.C. 204.

Under the Mahomedan law, the uncle is not the legal or natural guardian of the property of a minor, and so if a joint decree is passed in favour of an adult uncle and his two minor nephews, the adult decree-holder is not competent to give a valid discharge so as to bind the interests of the minor decree-holders—*Court of Wards v. Abrar Ali*, 78 I.C. 285, A.I.R. 1924 Lah. 681.

96. Receiver:—A receiver was appointed to collect the debts due to a firm, in which some of the partners were minors. One of the assets of the firm was a decree. An application for execution of the decree made more than three years after the appointment of the receiver was held as barred, in as much as the receiver was competent to give a valid discharge. When the debts had vested in the receiver, the minority of any of the members would cease to have any importance, for the rights of the minors and the rights of the majors were all absorbed by the receiver—*Girija v. Kanhiya*, 18 C.W.N. 138 (140), 20 I.C. 701.

97. Tort:—As a general rule, where a joint right to sue arises out of a tort, one or some of the holders of such right cannot give a discharge without the concurrence of the others, unless they are all partners or executors or members of a joint Hindu family, the manager of which has implied authority to bind all the members by his discharge—*Harihar v. Bholi*, 6 C.L.J. 383. But this rule is not an inflexible one, and where two persons have been damnified by the same tortious act, one is entitled to enforce his claim for damages so far as he has been injuriously affected by the tort, although the claim of the other is barred by limitation—*Ibid.*

98. Pleading :—If one of several plaintiffs is a minor, and if the provisions of this section apply, it would not be necessary in the plaint to expressly claim exemption from the law of limitation. The fact is patent on the record—*Gangadhar v. Khaja Abdul*, 11 C.L.J. 34, 14 C.W.N. 128, 2 I.C. 77.

8. Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

Illustrations.

(a) A, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accrual. A has, under the ordinary law, only one year remaining within which to sue. But under section 6 and this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority, within which he may bring his suit.

(b) A right to sue for an hereditary office accrues to A who at the time is insane. Six years after the accrual A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under section 6 read with this section.

(c) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accrual, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. Section 6 read with this section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

Scope of Section :—This section is ancillary to and restrictive of the concession granted in secs 6 and 7, and does not confer any substantial privilege—*Rangaswami v. Thangavelu*, 42 Mad 637 (640).

Before the Act of 1877 was passed, sec. 7 applied to suits for pre-emption. See *Raja Ram v. Bansi*, 1 All 207. This is no longer the law.

99. Extension :—This section must be read together with each article in Schedule I, and when the period prescribed by the latter extends to three years or more, and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full term of three years, but when the prescribed period is less than three years and the minor gets that period (according to Sec. 6) from the date of the majority, the prescribed period, is not to be enlarged to three years—*Subramanya v. Siva Subramanya*, 17 Mad. 316 (323).

The effect of section 6 is that a person under disability may sue after the cessation of the disability within the same period as he would otherwise have been allowed under the Schedule ; and the present section adds a proviso that in no case can the period be *extended* to anything beyond three years from the cessation of the disability—*Vasudeva v. Maguni*, 24 Mad. 387 (395) (P.C.).

The extended period of three years after attaining majority can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. A person who was not in existence at that time does not come within this description and therefore is not entitled to the three years' extension. Thus, if a suit is brought to contest an alienation of joint family property, it is from the date of alienation that the period of limitation is to be reckoned, and a coparcener born after the date of alienation cannot claim to bring a suit within three years after majority, as he was not in existence at the date of alienation, he cannot claim the benefit of this section—*Ranodip v. Parameswar*, 47 All. 165 (P.C.), 29 C.W.N. 668, A.I.R. 1925 P.C. 33, 86 I.C. 249.

If a minor acquired a cause of action to sue for possession of property (Art 142), and after attaining majority died within the three years allowed by this section, his legal representative can institute a suit at any time within the three years' period which had already commenced within the lifetime of the deceased, although more than twelve years have elapsed from the accrual of the cause of action—*Arjun v. Ramabai*, 40 Bom. 564 (567), 18 Bom. L.R. 579, 37 I.C. 221. Cf. Sub-section (3) of section 6, which provides for an extension of time in favour of the legal representative of a person with a cause of action dying under disability.

9 Where once time has begun to run, no subsequent disability or inability to sue stops it :

Continuous running of time.

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

100. Principle :—The rule of this section has been taken from the English Law. "Time when once it has commenced to run in any case will not cease to do so by reason of any subsequent event. Generally when any of the statutes of limitation have begun to run, no subsequent disability will stop this running"—Banning on Limitation (3rd Edn) pp 7-8 "When the time has once begun to run, it will continue to do so even should subsequent events occur which render it an impossibility that an action should be brought."—Darby and Bosanquet on Limitation (2nd Edn.) page 25.

Parties to a contract may agree to postpone the accrual of any rights under it, but they cannot postpone the period of limitation in case a suit should have to be filed for its breach; since under section 9, it is clear that when once limitation begins to run, it cannot be stopped by anything that happens subsequently. Therefore, where the period has commenced to run, a reference to arbitration would not prevent the operation of the law of limitation, and the period between the date of agreement to refer to arbitration and the date when the arbitration proceeding terminated should not be excluded from computation—*Ramamurthi v. Gopayya*, 40 Mad. 701 (705), 31 M.L.J. 231, 35 I.C. 575, *Sheikh Abdur Rahim v. Barira* 2 P.L.T. 556, 61 I.C. 807, 6 P.L.J. 273 (283). On the principle of this section it has been held that limitation having once commenced to run in the lifetime of a full owner cannot be taken to be suspended if he dies and is succeeded by a limited owner—*Batisa Kuer v. Raja Ram*, 5 Pat. 441, 7 P.L.T. 393, 92 I.C. 177, A.I.R. 1920 Pat. 102. When the time has once commenced to run against the absolute owner, no subsequent alteration in the title will postpone the bar—*Lilabati v. Bishun*, 6 C.L.J. 621.

Scope of section.—The section applies not only to suits but to applications as well. The words 'to sue' should be taken as including within it 'to apply in execution'—*Muthu Korakki v. Madar Ammal*, 43 Mad. 185 (207), 38 M.L.J. 1 (F.B.).

100A. When time runs—Time runs when the cause of action accrues, and the cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed—*Coburn v. Colledge* [1897] 1 Q.B. 702, *Gelman v. Morriggia*, [1913] 2 K.B. 549. The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief—*Whalley v. Whalley*, (1816) 1 M.R. 436. It is only when the cause of action is complete that the bar of time begins to run, for example, if a previous demand is required before the complete right to sue arises, the time will only run as from the date of demand—*Tidd v. Overell*, [1893] 3 Ch. 184. (Compare Arts. 60, 88, 89). Therefore, if the plaintiff commences his action before his right of action is complete, he must inevitably fail in the action, even though he should be able to acquire and actually acquire the outstanding right during the currency of the action—*Godfrey v. Tucker*, (1863) 33 Beav. 280. For example, a remainder man, unless he first gets in the prior subsisting life-estate, will lose his action for a partition, although he should have got in the life-estate during the currency of the action—*Evans v. Bagshaw* (1870) 1 L.R. 8 Eq. 469. L.R. 5 Ch. App. 340. The Statute of limitation does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when the plaintiff could have first maintained his action to a successful result—*Angell on Limitations*, sec. 42, *Story's Equity Jurisprudence*,

sec. 1521-a. Whenever proceedings are being conducted between the parties *bona fide* in order to have their mutual rights and obligations in respect of a matter finally settled, the cause of action for an application or for a suit, the relief claimable wherein follows naturally on the result of such proceedings, should be held to arise only on the date when those proceedings finally settle such rights and liabilities—per Sadasiva Ayyar J. in *Muthu Korakki v. Madar Ammal*, 43 Mad. 185 (F.B.). An useful analogy is furnished by cases where it has been ruled that time cannot be held to run against a person who is not in a position to sue, for such a person has no enforceable cause of action which is extinguished by lapse of time, thus, adverse possession against a tenant does not operate against the landlord during the continuance of the tenancy—see Note 613 under Article 144, so also, adverse possession against a mortgagor does not operate against a simple mortgagee who is not entitled to immediate possession—*Priyasakhi v. Manbodh*, 44 Cal 425; see Note 616 under Article 144.

In a recent case of the Calcutta High Court, M N Mukherji, J. has remarked that the statement that the cause of action accrues only when the plaintiff could have maintained his action to a successful result, should be accepted with caution. His Lordship observes. "A careful study of the third column of the schedule reveals an outstanding fact which cannot be ignored, namely that the starting point of limitation does not always synchronise with the cause of action; in many cases it does, but in others it dates from some specified events which are either anterior or posterior to the accrual of the cause of action In the case of such of the articles of the Limitation Act in which the starting point of time synchronises with the cause of action, I am prepared to hold that the test is to ascertain the time when the plaintiff could have maintained his action to a successful issue. If, in such a case, at the time when the cause of action arises, there is no person capable of suing upon it, the statute does not run; similarly, it is necessary that there shall be a person to be sued, and it is also necessary that the cause of action should be completed, that is, all the facts must have happened which are material to be proved in order to entitle the plaintiff to succeed."—*Sarat Kamini v. Nagendra*, 29 C.W.N. 973, 43 C.L.J. 155, 89 I.C. 1000, A.I.R. 1926 Cal. 65.

101. Disability, Inability :—Disability is want of legal qualification to act; inability is want of physical power to act—*Purno v. Sasoon*, 25 Cal. 496 (504) (F.B.). For the purpose of limitation, a disability is the state of being a minor, insane or an idiot; whereas illness, poverty etc. are instances of inability.

The disability or inability contemplated by sec. 9 is confined to such cases as are mentioned in the Act itself, and new exemptions cannot be recognised—*Sarat Kamini v. Nagendra*, 29 C.W.N. 973, A.I.R. 1926 Cal. 65 (67), 89 I.C. 1000.

The Legislature has caused some confusion in introducing the word 'inability' into this section, there being no 'inability' mentioned in any portion of the Act. Consequently the inability referred to here must be

held to be a personal inability affecting the plaintiff himself and having reference to his condition, state or position, and not to the circumstances of the person against whom he is suing. The fact that the plaintiff was unable to sue the defendant owing to the latter's absence from British India would not constitute an 'inability' under this section so as to make the period of limitation run continuously. In such a case the rule of section 13 will apply and the period of defendant's absence from British India will be excluded from computation. This section does not in any way qualify section 13—*Hanumantram v. Bowles*, 8 Bom. 531 (dissenting from 6 Bom. 103); *Beake v. Davis*, 4 All. 530. The defendant's absence from British India does not amount to inability to sue—*Jivraj v. Babaji*, 29 Bom. 68 (70).

In cases where the plaintiff is unable to sue because of the non-appointment of a personal representative to a deceased debtor in whose life-time the period has commenced to run, but who has died subsequently, the statute will continue to run—*Rhodes v. Smethurst*, 4 M. & W. 42; *Boatwright v. Boatwright*, L.R. 17 Eq. 71.

This section contemplates a case of subsequent and not of initial disability, that is, it contemplates those cases where the disability has occurred after accrual of the cause of action; whereas cases of initial disabilities have been provided for by section 6. Thus, a decree-holder after making various applications for execution of a decree, each of which was within time, died. His son, a minor, made an application for execution of the decree within three years after his father's death but more than three years after the date of the deceased father's last application. It was held that this section applied and not section 6, and the minor's application for execution was time-barred, it being a case not of initial but of subsequent disability—*Jivraj v. Babaji*, 29 Bom. 68; *Kalka Bakhsh v. Ram Charan*, 40 All. 630 (F.B.), 16 A.L.J. 633, 46 I.C. 584. Where a decree-holder died, leaving a minor son who, on attaining his majority nine years after the date of the decree, applied for execution, it was held that the application was barred, as time had begun to run in the original decree-holder's life time—*Bhagat v. Ramnath*, 27 All. 704; *Bhagwant Ramchandra v. Kaji Mahamad*, 36 Bom. 498; *Nusheeran v. Shushee*, 5 W.R. 169; *Vira v. Muruga*, 2 M.H.C.R. 340. But where the original decreeholder who obtained a decree in May 1886, died in June 1888, leaving three minor sons, and on 30th April 1889 the sons, still minors, made an application for execution, but no further proceedings were taken till 1st October 1904 when another application was made, held that the present application was within time on the ground that although limitation had commenced to run against the father from May 1886, the application made by the minors on the 30th of April 1889 was a step in aid of execution, and time began to run anew from that date and then minority suspended it—*Sri Ram v. Het Ram*, 29 All. 279. Cf. *Lalit Mohan v. Janoky*, 20 Cal. 714 (716).

The insanity of the decreeholder, which began after the passing of the decree, did not save limitation which had already commenced to run from the date of the decree—*Aya Singh v. Gurdial*, 72 P.L. II, 1900.

An unregistered instalment bond was executed in favour of a Hindu widow. It contained a stipulation that the whole amount would be recoverable in default of payment of two consecutive instalments. Default was made in payment of two instalments in 1899. Shortly after the default, the widow adopted the plaintiff, who was then a minor. In 1908 within three years of attaining majority but nine years after default he sued on the bond but expressly relinquished the amount due in respect of the first two instalments which had fallen due prior to his adoption, on the ground that he had waived payment of the same. On this footing he alleged that the cause of action had arisen during his minority and that therefore the claim for the remaining instalments was not barred. It was held that mere abstinence from suing did not amount to waiver; that limitation had begun to run from the default in 1899, and no subsequent disability, viz. the minority of the plaintiff, could prevent it from running. The suit was barred by the three years' rule under Article 75—*Girindra Mohan v. Khir Narayan*, 36 Cal 394. A suit by a shebait in 1913 to recover possession of a debutor property held by the defendant under a *mokurari* lease granted by a previous shebait in 1876 is barred by Article 134, as brought more than 12 years after the date of the lease. The representation of an idol by shebait is a continuing representation, and limitation runs against the idol continuously and not against each shebait individually if and when he succeeds to the shebaitship. Consequently the fact that the succeeding shebait was a minor would not stop the running of time, by virtue of the provisions of this section—*Manmatha v. Annada*, 27 C.L.J. 201, 44 I.C. 567.

The plaintiffs, a German Bank, were the endorsees of certain promissory notes drawn by the defendants, dated June 1914. On the 4th August, 1914, war was declared with Germany, and the plaintiffs were debarred from bringing any action to enforce their claim. On 1st November 1915, the plaintiffs obtained license from Government to bring an action, and on 9th May 1918 the present suit was filed. The plaintiffs claimed that the period between the 4th August 1914 and 1st November 1915 should be deducted from computation, and they urged that their suit was within time. It was held that the suit was barred. Under this section, once time has begun to run, no subsequent disability or inability in the shape of suspension of right to sue stops it, and the plaintiffs are not entitled to exclude the period of such suspension—*Deutsche Asiatische Bank v. Hira Lal*, 46 Cal 526, 23 C.W.N. 157, 47 I.C. 392. And so in a case that occurred during the time of the English Civil Wars, the plaintiff in answer to a plea of limitation replied that a Civil War had broken out and the Government was usurped by certain traitors and rebels which hindered the course of justice and by which the Courts were shut up, and that within six years after the war ended he commenced his action and yet his replication was held to be ill—*Prideaux v. Webber*, 1 Lev 31.

Voluntary and involuntary disabilities:—There is no distinction between voluntary and involuntary (e.g. caused by minority) disabilities—*Khanjan v. Bhikan*, 18 I.C. 306 (Oudh). As the rule stands,

it appears to apply strictly to every case of subsequent disability or inability excepting those cases that may be specifically exempted from the operation of this rule. Even circumstances beyond the control of the plaintiff have been held not to relax the rigour of the rule in favour of the plaintiff—*Ibid.* In *Doe d Duroure v. Jones*, (1791) 4 T.R. 300, 2 R.R. 390, Lord Kenyon observed that it was mischievous to make any refined distinctions between voluntary and involuntary disabilities.

102. Suspension of cause of action.—Ordinarily, time begins to run from the earliest time at which an action can be brought, and after time has commenced to run, there may be a revival of the right to sue when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is re-animated—*Dwijendra v. Jogesh Chandra*, 39 C.L.J. 40, 79 I.C. 520, A.I.R. 1924 Cal. 600. Thus, certain disputes between a principal and an agent were referred to arbitration, and under the award thereon certain moneys were paid by the agent in satisfaction of the claim. The agent afterwards sued to set aside the proceedings on the ground that they were brought about by coercion, and succeeded in getting back the amount paid. The principal subsequently sued the agent to enforce the original liability to account. The defendant pleaded *inter alia* that the suit was barred. Held that the setting aside of the satisfaction in the former proceedings gave rise to a fresh cause of action and that the suit was therefore in time—*Mathuveerappa v. Adaikeppa*, 43 Mad 845, 39 M.L.J. 312, 59 I.C. 472. Plaintiff realised the money due to him from the defendant on an award which had merged in a decree of Court. Subsequently the award was set aside and the plaintiff directed to refund the money realised by him. In a suit by the plaintiff for recovery of the amount it was held that when the plaintiff's original claim was satisfied in execution, limitation ceased running against him. On the annulment of the satisfaction a fresh cause of action arose and the suit was within time—*Kartar Singh v. Bhagat Singh*, 2 Lah. 320, 64 I.C. 454. A sale under the Patni Regulation having been set aside and the patnidars restored to possession, the Zemindar sued them to recover the arrears of rent which had accrued before and during the time they were out of possession, the tenants contended that the claim was barred because the suit had not been brought within three years from the date when each instalment of rent fell due; but the Judicial Committee overruled the contention and held that the cause of action accrued upon the reversal of the auction sale and the consequent revival of the obligation to pay the rent—*Surnomoyee v. Shooshee Mookhee*, (1868) 12 M.I.A. 244 (P.C.). A debtor agreed to convey certain property to his creditor and to set off the debt against part of the consideration for the conveyance. A sale-deed was executed but a dispute arose as to whether it had been executed in accordance with the contract. Litigation was commenced by the debtor to enforce the agreement, but he was unsuccessful. The creditor then sued to recover the debt and was met with the plea of limitation. The Judicial Committee held that the time began to run only when the agreement became wholly ineffectual and that from that date a fresh obligation was imposed upon the debtor.

to pay his debt—*Bassu Koer v. Dhum Singh*, 11 All 47 (P.C.). See also *Nrityamani v. Lakhan Chandra*, 43 Cal 660 (P.C.) cited in Note 156 under sec. 14; and *Prannath v. Rookea Begum*, 7 M.I.A. 323 (P.C.); *Hem Chandra v. Kali Prasanna*, 30 Cal. 1033 (P.C.).

But in the following cases the Judicial Committee and the Indian High Courts have strictly applied the principle of sec. 9 that when once time has begun to run, no subsequent inability to sue stops it—*Huro Persad v. Gopal Das*, 9 Cal. 255 (P.C.), *Soni Ram v. Kanhaiya Lal*, 35 All. 227 (P.C.); *Juscurn v. Pirthi Chand*, 46 Cal. 670 (P.C.); *Hukum Chand v. Shahab Din*, 4 Lah. 90, 71 I.C. 495. Thus, where a mortgagee is entitled to possession immediately, time begins to run from the date of the mortgage (Art 135) and the mere fact that the possession of the mortgaged property was subsequently taken by a prior mortgagee does not prevent limitation from running—*Hukum Chand v. Shahab Din* (*supra*).

The Indian Limitation Act is undoubtedly an exhaustive code governing the law of limitation in India. The cases in which the running of limitation can be suspended are contained in the sections of the Act. It would be dangerous to lay down generally that there is some principle outside the Limitation Act under which limitation can be suspended. We are therefore unable to accept any universal principle of suspension of limitation outside the Limitation Act—*Ram Charan v. Goga*, 49 All 565, 102 I.C. 96, A.I.R. 1927 All. 446. There is nothing in the Limitation Act which would justify the Court in holding that once the period of limitation had begun to run it could be suspended. If the Courts were to hold that by some reason the period of limitation was suspended they would be deciding contrary to the express enactment of sec. 9—*Soni Ram v. Kanhaiya Lal*, 35 All. 227 (P.C.), 19 I.C. 291. The Judicial Committee have laid down that there can be no saving of limitation apart from the provisions of the Limitation Act. The Judicial Committee have drawn attention to secs 9 and 14 and have held that exemptions not covered by these and other sections should not be imported by Courts to relieve a party from the bar of limitation—*Muthu Korakki v. Madar Ammal*, 43 Mad. 185 (F.B.) (*per Seshagiri Aiyar J*). In applying the principles of limitation, the Indian Courts are not permitted to travel beyond the provisions embodied in the Limitation Act, and apart from the provisions of that Act there is no principle which can legitimately be invoked to add to or supplement its provisions—*Sarat Kamini v. Nagendra*, 29 C.W.N. 973, 89 I.C. 1000, A.I.R. 1926 Cal 65; *Satyanaarayana v. Seethayya*, 50 Mad 417, A.I.R. 1927 Mad 597, 100 I.C. 776. And so, in computing the period of limitation for a suit against a Ruling Chief (*e.g.* the Gaekwar of Baroda) the plaintiff is not entitled to deduction of the time spent by him in obtaining the Government of India's consent under sec. 86 C. P. Code, as secs 4 to 25 contain no statutory provision enabling the plaintiff to deduct that time—*Sayaji Rao, Gaikwar of Baroda v. Madhavrao*, 53 Bom 12, 30 Bom L.R 1463, 115 I.C. 369, A.I.R. 1929 Bom. 14 (19, 23).

For a full discussion on this subject, see the judgments of Sir Asutosh Mookerjee, J. in *Dwijendra Narain v. Jogesh Chandra*, 39 C.L.J. 40, 79 I.C. 520, A.I.R. 1924 Cal. 600, and of M. N. Mukerji J. in *Sarat Kamini v. Nagendra Nath*, 29 C.W.N. 973, 43 C.L.J. 155, A.I.R. 1926 Cal. 65.

103. Proviso :—The principle of the proviso is this: "When after the Statute has commented to run, the right to sue and the right to be sued meet by act of law (and unite) in the same person, the further running of the Statute will be suspended during the period of the union of the two rights"—*Scagram v. Knight*, (1867) 36 L.J. Ch. 918; *Burdick v. Garrick*, (1871) L.R. 5 Ch. App. 233. "Where the hand to pay and receive is practically the same, a constructive payment is presumed." See *Topham v. Booth*, 25 Ch D 607; *In re Dixon*, 2 Ch 561. The general rule that when time has once begun to run, nothing happening subsequently will prevent it from continuing to run, is inapplicable where the debtor takes out administration to the creditor, for in such a case there is a suspension of the remedy—*Scagram v. Knight*, (supra). Thus, where a debtor was appointed one of several executors but he did not prove the will until his debt was barred by time, and then he subsequently proved the will, the debt was held to be thereby revived and the debtor-executor was ordered to account for the debt with interest—*Ingle v. Richards*, (1860) 20 Beav. 366

This proviso applies only to an administrator under the grant of letters, where he is a debtor of the deceased—*Damodar v. Dayal*, 11 Bom. L.R. 1187, 4 I.C. 283. It cannot be extended to a case where the rights of the mortgagor and the mortgagee vest in the same person. In such a case, limitation would not be suspended. Thus, a usufructuary mortgage was executed in 1842 in favour of K. The mortgagee died in 1898, but between 1883 and 1898 one M had by assignment acquired the rights of the mortgagor as also the mortgagee's rights and was in possession of the estate. In 1904 the heirs of K sued for and obtained possession of the estate from M (treating him as a trespasser) and in 1907, M's son S sued to redeem the property from the heirs of K. Held that the suit was barred by Article 148. Limitation had commenced running against the mortgagee from 1842, and it was not suspended between 1883 and 1898 owing to the fusion of the mortgagor's and mortgagee's interests in M during that period. The proviso to section 9 did not apply to the case—*Soni Ram v. Kanhaiya Lal*, 35 All. 227 (P.C.), 19 I.C. 291, 17 C.W.N. 605.

10. Notwithstanding anything hereinbefore contained, no suit against a person in

Suits against express trustees and their representatives.

whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such

property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

For the purposes of this section, any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof.

The 2nd para is new See "Religious endowment" in Note 103 below.

103A. The rule of this section follows the English law. Section 25 (2) of the English Judicature Act 1873 (36 and 37 Vict. C. 66) lays down:—"No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitation." It is well settled, both as regards real estate and personal estate that time does not in equity bar the remedy of the beneficiary against the trustee—*Waderburn v. Wederburn*, (1838) 4 My. & Cr 41; *Bridgman v. Gill*, (1857) 24 Beav. 302. If there is created in express terms, whether written or verbal, a trust, and a person is in terms nominated to be the trustee of that trust, a Court of equity, upon proof of such facts, will not allow him to vouch a Statute of Limitation against a breach of that trust—*Soar v. Ashwell*, [1893] 2 Q B. 390.

The words of this section mean that when a trust has been created expressly for some specific purpose or object, and property has become vested in a trustee upon such trust, the person who is beneficially interested in that trust may bring a suit against such trustee to enforce that trust at any distance of time without being barred by the law of limitation—*Kherodmoney v. Doorgamoney*, 4 Cal. 455 (465). As a result of this section, an apparently fraudulent trustee who has put trust-money into his own pocket cannot escape by reason of lapse of time—*Chintaman v. Khanderao*, 52 Bom. 184, 30 Bom. L.R. 45, A.I.R. 1928 Bom. 58.

104. Who is not a trustee:—All persons holding a fiduciary relation are not necessarily trustees within the meaning of this section. Thus, the position of agents, managers, factors and benamidars may be and generally is a fiduciary one, but none of them are necessarily trustees—*Kherodmoney v. Doorgamoney*, 4 Cal. 455 (469); *Kishen Dei v. Rari Chand*, 26 P.L.T. 288, A.I.R. 1927 Lah. 773

A mortgagee in possession after the mortgage has been satisfied is not a trustee for the mortgagor—*Babu Lal Dass v. Jamal*, 9 W.R. 187. See sec. 2 (11). A suit against such mortgage is governed by Art. 105.

The position of the sons who manage the estate of a deceased Mahomedan is not, by reason of such management, that of trustees as

regards the daughters—*Mahomed Abdul v. Amtal Karim*, 16 Cal. 161 (169) (P.C.).

A Muhammadan husband is not a trustee for his wife in respect of her dower—*Mir Mohar v. Anani*, 2 B.L.R. A.C. 306.

A person with whom money is kept in deposit is not a trustee—*Mukhta v. Gajraj*, 1 A.L.J. 422; *Dalipa v. Labhu*, 47 I.C. 592, 1919 P.R. 4; *Kalyan Mal v. Kishen Chand*, 41 All. 643 (645).

A banker and customer do not stand in the relation of trustee and *cestui que trust* but only of debtor and creditor or of borrower and lender—*Foley v. Hill*, 2 H L C. 28. Article 60 expressly provides for the case.

A depository or banker or agent or debtor to whom a loan is made and who promises to return the loan, does not thereby become a trustee within the meaning of this section—*Rajammal v. Lakshammal*, 1914 M.W.N. 606, 22 I C 936. An agent is not a trustee—*Bhaiyalal v. Beharilal*, A.I.R. 1925 Nag 115.

A *benamidar* is not a trustee—*Wooma v. Dwarkanath*, 11 W.R. 72; *Krishna Pattar v. Lakshmi*, 45 Mad. 415; see sec 2 (11).

A surviving partner is not a trustee for the representative of the deceased partner—*Knox v Gye*, L.R. 5 H L. 656 (676).

The directors of a company are not trustees; see Note 108 below.

Where a mortgagee in contravention of the terms of O 34, rule 14 of the C P. Code has attached the mortgaged property and brought it up to sale and purchased it himself, he does not become a trustee for the mortgagor in respect of the latter's equity of redemption so as to enable the latter to bring a suit for redemption at any length of time—*Uttam Chandra v Raj Krishna*, 47 Cal 377, 414 (F B.), 24 C.W.N 229

Co-heirs.—If one heir of a deceased person recovers the debt due to the deceased on behalf of all the other heirs, he does not thereby become a trustee for the others. A suit brought against him by the other heirs for their share of money is governed by Art 62 and not by this section—*Amina v. Najmunnissa*, 37 All 233 (240), 13 A.L.J. 255, 27 I.C. 712.

105. Who is a trustee :—The *mohant* of a *mutt* is a trustee of the *mutt* properties—*Devastikamani v. Valliammal*, 37 M L J. 231, 52 I C. 914; *Ram Perakash v. Anand*, 43 Cal. 707 (P.C.); *Basudeo v Mohant Jugal Kishore*, 22 C.W.N 841 (P.C.), *Baluswami v Venkateswami*, 40 Mad 745 See the new second para.

A suit for the recovery of balance of money advanced by the plaintiff to the defendant who was his servant for the purpose of erecting buildings, the money having been entrusted to the defendant to be accounted for by him, will not be barred by limitation, for the matter was of the nature of a trust—*Narain Doss v. Maharaja Mahtab Chunder*, 10 W.R. 174. Where property is vested in a person partly for charitable purposes and partly for the benefit of others, and he is bound to use it for such purposes and not for his own advantage, he is a trustee within the

meaning of this section—*Syud Shah Alleh v. Bibee Nuseebun*, 21 W.R. 415 (416). Where immoveable property was given possession of to the defendant to sell the crops, to pay the Government dues and to account for the profits to the plaintiff on his claiming them, it was held that the defendant was not a depository but a trustee of the property—*Vital v. Ram Chandra*, 7 B.H.C.R., A.C., 149.

Where A handed to the defendant the key of his place of business and requested him to take charge of his goods and outstandings, to pay certain specified debts out of them and to apply the residue for the benefit of A's family, a good trust was created at any rate as far as the debts were concerned—*Suddasook v. Ram Chunder*, 17 Cal. 620 (628).

Where certain jewels were in the possession of the defendant and he agreed under a written instrument that the plaintiff should enjoy the jewels for her life and that after her death they should be divided among the defendant and the other parties to the instrument, held that the defendant was an express trustee of the jewels for the plaintiff and that a suit by her for the jewels or their value fell under this section—*Kishtappa Chetty v. Lakshmi Ammal*, 44 M.L.J. 431, 72 I.C. 842, A.I.R. 1923 Mad. 578.

A Receiver appointed under the order of the Court is a trustee—*Seagram v. Tuck*, 18 Ch. D. 296.

Where a person sentenced to transportation for life makes over his properties to be managed by his brother or other near relatives, and requests the Revenue authorities to have those properties transferred in the name of the latter, such transfer is in the nature of a trust—*Hait Ram v. Durga Prasad*, 5 All. 608 (612).

Under section 69 of the Transfer of Property Act the money received by a mortgagee arising from sale of the mortgaged property in pursuance of a power of sale should be deemed as held by him in trust to be applied in the manner directed in that section. See also *Haji Abdul Rahman v. Noor Mahomed*, 16 Bom. 141 (144). In England also, where the mortgagee has exercised the power of sale in good faith and without collusion, he is only a trustee for the mortgagor in respect of the balance of the sale-proceeds—*Warner v. Jacob*, 20 Ch. D. 220.

A trustee *de son tort* is in the same position as an express trustee, and a suit for accounts in respect of trust property in his hands comes under this section—*Dhanpat v. Mohesh Nath*, 24 C.W.N. 752 (755), 57 I.C. 805. But the Allahabad High Court is of opinion that section 10 does not apply to a suit for account against a trustee *de son tort*: such a suit is governed by Article 120—*Behari Lal v. Shiv Narain*, 47 All. 17, 22 A.L.J. 866, A.I.R. 1924 All. 884 (dissenting from 24 C.W.N. 752).

A person who is once in possession in a fiduciary character does not cease to hold in that character merely because it becomes uncertain who is the actual person to whom he has to account—*Ljell v. Kennedy*, 14 A.C. 437.

106. Government:—The Government and the Secretary of State cannot be trustees—*Kinloch v. Secretary of State*, L.R. 15 Ch. D 1, at p. 9. The fact that the Government took possession of a property (a khoti village) originally with the intention of keeping it only until the rival claimants to it established their claim in the Civil Court, cannot imply that the Government agreed to hold the property in trust for an indefinite time on behalf of the rightful owner. This section cannot apply to the case, and a suit brought to recover the property which was for fifty years in the possession of the Government was barred—*Secretary of State v. Sakharum*, 24 Bom. 23. The Government by directing the Court of Wards to take charge of an estate during the minority of the next claimant does not constitute itself a trustee for the rightful owner—*Palkonda Zemindar v. Secretary of State*, 5 Mad. 91 (F.B.) affirmed on appeal in *Vizaramarazu v. Secretary of State*, 8 Mad 525 (P.C.)

This section will not apply to a suit against the Secretary of State to recover the surplus proceeds of a sale for arrears of revenue. The Government is not a trustee in respect of such money—*Secretary of State v. Fazal Ali*, 18 Cal. 234; *Secretary of State v. Guru Proshad*, 20 Cal. 51 (F.B.) See also *Chandra Kali v. E. P. Chapman*, 32 Cal 799 (at p. 813) where it was held that the Government was not a trustee in respect of certain G. P. notes which were paid into Court under a consent decree and subsequently lost. The Judge remarked that the Comptroller-General or any other officer charged with the payment of the obligations of the Government could not be regarded as a trustee; their duty was simply to pay the debts of the Government in a certain way. He further held that there had been no vesting in trust for any purpose in the Registrar of the Court, and the G. P. Notes could not be regarded as trust property.

But under certain exceptional circumstances the Government can be a trustee within the meaning of this section. Thus, it was held in *Secretary of State v. Bapuji Mohadev*, 39 Bom 572, 31 I.C. 277, that money lying in deposit in the Government Treasury as surplus sale-proceeds was money vested in Government in trust for a specific purpose, and a suit to recover the money was not barred by any length of time. The facts of the case are that one Chinto Mahipat of Satara, ancestor of the plaintiff, owed money to one Sheik Mufati of Aurangabad and in order to satisfy that debt Shrimant Partapsing Maharaj, the then Raja of Satara, caused Chinto Mahipat's immoveable property to be sold in 1835 and out of the sale proceeds the debt was paid off and the balance of Rs. 1793 was credited in the Government treasury in the name of Chinto Mahipat. After many years the plaintiff who stood in the shoes of Chinto Mahipat sued for the money, and it was held that the East India Company, as well as the Government of India who succeeded it, was a trustee (following *Walsh v. Secretary of State for India* (1863) 10 H.L.C. 367). The same view has been expressed in a Madras case, the facts of which are peculiar and interesting. After the administration of Tanjore was taken over by the East India Company, an agreement was entered into

in 1824 between the Company and the creditors of the deposed Raja for payment of debts due to them from the Raja. In accordance with this agreement bonds were issued to the creditors in 1845 including the suit-bond in favour of the plaintiff's ancestor. In 1853 and 1858 the East India Company and its successor the Government of India had published notices for payment of the bond debts on tender of the notes and declared that interest would henceforth cease. The plaintiff issued a notice of demand in 1916, and instituted the present suit in 1919 against the Secretary of State, who pleaded the bar of limitation. *Held* that the East India Company and its successor the Government of India had become trustees for a specific purpose under the agreement of 1824 for the discharge of the bonds issued in pursuance thereof, and the suit was not barred by limitation (section 10)—*Secretary of State v. Radhika Prasad Bapuli*, 46 Mad. 259, 44 M.L.J. 685, 74 I.C. 785, A.I.R. 1923 Mad. 667.

107. Executor, Administrator.—This section will apply to an executor only if he is a trustee for a specific purpose; the mere appointment of a person as an executor does not make him a trustee—*Damodar v. Dayal*, 4 I.C. 283, 11 Bom.L.R. 1187; *Gajanan v. Waman*, 12 Bom L.R. 881, 8 I.C. 189 (190); *Nagarathnammal v. Namasiyaya*, 5 I.C. 832; *Baroda v. Gajendra*, 13 C.W.N. 557, *Kherodemoney v. Doorgamoney*, 4 Cal. 455 (468). There is no authority for converting an executor into a trustee by anything like a performance of his duties *qua* executor—*Jamnadas v. Damodardas*, 29 Bom L.R. 418, 103 I.C. 225, A.I.R. 1927 Bom. 424. Whether an executor is a trustee for a specific purpose depends upon the facts of each case—*Damodar v. Dayal*, 11 Bom L.R. 1187. Where the executors in a will were expressly called trustees, and were entrusted with the testator's property for certain definite purpose, *held* that this section applied—*Dhunjishaw v. Sorabji*, (1896) P.J. 572. Where certain property was by will vested in executors to pay legacies and the residue to the testator's widow who sued for administration of her share and for a declaration that certain lease granted by the executors to themselves was void against her, it was held that the suit was within this section as the property was vested in the executors in trust for a specific purpose, viz., to pay legacies etc.—*Nistarini v. Nundolal*, 30 Cal. 369. Where a will gave no directions as to the disposition of the residue, the executors were not trustees of the residue for a specific purpose—*Nanatal v. Harlochand*, 14 Bom. 476.

In England also, the executor is not an express trustee even for a legatee—*Evans v. Moore*, [1891] 3 Ch. 119. An executor is in general a constructive trustee only, although popularly described as a trustee, and while and so long as he is but a constructive trustee, the lapse of time will operate to bar the legacy—*Evans v. Moore*, (supra); *In re Mackay*, [1906] 1 Ch. 25. That is to say, only an *express* trust, and not a mere constructive trust, will suffice to prevent the bar of time running against a legacy. An executor is always a trustee, in a sense, for creditors and legatees because he holds the personal estate for their benefit and not for his own benefit, but such a trust is not an express trust, and does not

exclude the application of the bar of time—*Evans v. Moore*, (supra) The ordinary direction in a will to the executors (whether or not being also trustees of the will) to pay the debts and the legacies, creates no trust for their payment; and the mere use of the word 'trust' in the bequest to the creditors (upon trust to pay the debts and the legacies) will not, without more, create a trust either for the creditors or for the legatees; in either case the lapse of time will be a bar to the legacy—*Cadbury v. Smith*, (1869) L.R. 9 Eq. 37. Neither an executor nor an administrator becomes an express trustee for a legatee merely because his duties as such are performed and he retains moneys on behalf of those claiming the estate. He does not become a trustee by the performance of his duties *qua* executor. In other words, when the debts and funeral expenses are paid, he does not become a trustee for the residue—*In re Mackay*, [1906] 1 Ch 25 (30).

An administrator in whom no special trust is vested for a specific purpose is not a trustee—*Janardhan v. Jankibati*, 2 P.L.J. 642 (649).

108. "Vested":—Vesting implies that some one has an estate in the subject matter of the alleged trust, not merely that he has power to charge it or direct how it should be disposed of—*Dickenson v. Teasdale*, 1 DeG & S 52; *Coverdale v. Charlton*, 42 Q.B.D. 120. Therefore, the directors of a company are not trustees, because they are not persons in whom the property of the company may be said to have been vested under this section—*Kathiawar Trading Co. v. Virchand*, 18 Bom 119; *Daulat Ram v. Bharat National Bank*, 5 Lah 27 (31); *Bank of Multan Ltd. v. Hukum Chand*, 71 I.C. 899, AIR 1923 Lah. 58. But see *New Fleming S & W Co. v. Kessowji*, 9 Bom 373 (393, 394). Where the properties of the company did not come into the hands of the directors, they could not be said to be trustees—9 Bom 373 (399). So also, the liquidator of a company is not strictly speaking a trustee for the creditors but is merely an agent of the company—*Knowles v. Scott*, [1891] 1 Ch 717. The karta of a joint Hindu family is not a trustee, because the property cannot be said to have vested in him—*Biswambhar v. Giribala*, 25 C.W.N. 356, 32 C.L.J. 25. The word 'vest' is not an appropriate term to describe the position of a Hindu executor, the mere appointment of a person as executor to a Hindu does not cause any property to vest in him at all; if as executor he is entitled to hold the property, he holds it only as manager—*Kherodemoney v. Doorgamoney*, 4 Cal 455 (465). See Note 107 above. A minor girl inherited property from her maternal grandfather. The father of the minor took charge of the property and managed it. More than six years after attaining majority, the daughter sued her father to recover moneys not accounted for, and claimed that the suit was not barred, as section 10 applied to the case. Held that the father simply managed the property, and there was in fact no trust in this case, but by his acts he had only incurred obligations similar to those of a trustee. The property did not 'vest' in him as trustee; the word 'vest' implies that the property becomes in law the property of the trustee—*Ma Thein v. U Po*, 3 Rang. 206, AIR 1925 Rang. 299, 66 I.C.

297. But the Madras High Court is of opinion that the word 'vesting' simply means "properly having control of the property"—*Kishtappa v. Lakshmi*, 44 M.L.J. 431, A.I.R. 1923 Mad. 578; *Pachaiyappa v. Sivakami*, 49 M.L.J. 468, A.I.R. 1926 Mad. 109, 91 I.C. 671.

D executed a trust deed which contained this provision. "In order to prepare a list of my debts, the trustees shall ascertain the same by looking into my books of accounts and they shall not admit any debt without *rokur*, *hat-chitta* or *hundi* bearing the signature of myself or my *gomastas*, or without decree." It was held that in the absence of evidence that this deed was communicated to the creditors, it did not create a trust in favour of the creditors, but enured only for the benefit of the executant; that therefore the plaintiff, a creditor, was not entitled to rank as a beneficiary under it; and that it did not create a trust in his favour so as to take out of the operation of the Limitation Act a claim that otherwise fell within it—*Fink v. Moharaj Bahadur*, 25 Cal. 642.

It is open to a person to create a trust empowering another to go to a certain place for the purpose of acquiring land for him, and the land so acquired would become vested in the trustee from the moment of its acquisition, and the trust would fasten to that land exactly as if it had been vested in the trustee at the moment of the creation of the trust. The absence of the property at the date of creation of the trust does not affect the applicability of section 10—*Harihar Prasad v. Kesho Prasad*, 5 P.L.T. Supp. 1, A.I.R. 1925 Pat. 68.

Religious endowment :—See the second para, recently added by the Indian Limitation Amendment Act 1929 (Act I of 1929). Prior to this enactment it was pronounced by the Judicial Committee that in case of a religious endowment, whether under the Hindu or the Mohamadan law, the dedicated property could not be said to have been 'vested' in the shebait or mutwalli; whatever property he held for the idol or the institution, he held merely as manager with certain beneficial interests regulated by custom or usage. Under the Mahomedan law, the moment a wakf was created, all rights of property vested in God Almighty—*Vidya Varuthi v. Balusami*, 44 Mad. 831 (P.C.), A.I.R. 1922 P.C. 123, 65 I.C. 161. Neither the *sajjadanashin* nor the *mutwalli* had any right in the property belonging to the wakf; the property was not vested in him, and he was not a trustee in the technical sense—*Abdur Rahim v. Narain Das*, 50 Cal. 329 (P.C.), 28 C.W.N. 121, 25 Bom L.R. 670, 44 M.L.J. 624, 1923 P.C. 44, 71 I.C. 646. These decisions were followed in *Ganga Prasad v. Kuladananda*, 30 C.W.N. 415, 94 I.C. 235, A.I.R. 1926 Cal. 568; *Jaishth Madho v. Thakur Gat Ashram*, 50 All. 265, 25 A.L.J. 1047, A.I.R. 1928 All. 134, and other cases. The Privy Council rulings, however, did not find favour in India, as they were opposed to the view generally prevalent in the Courts. The Civil Justice Committee thought it necessary to counteract the effect of these rulings, and recommended that "in view of certain recent decisions the alienation of property vested in the head of a religious institution raises special problems for limitation purposes and should be specifically provided for" (Civil Justice

Committee Report, p. 496) Accordingly a Bill was prepared in 1927 (Council of State Bill No. 8 of 1927), to make the necessary amendments in the Limitation Act, and this Bill passed into law as Act I of 1929. The *Statement of Objects and Reasons* runs as follows:—

"The (Civil Justice) Committee's recommendation refers, it is understood, to the decisions of the Privy Council in *Vidyavaruthi v Balusami* (44 Mad. 831) and *Abdur Rahim v. Narain* (50 Cal. 329), which lay down that a *Dharmakarta*, *Mohant* or manager of a Hindu religious property or the *Mutwalli* or *Sajjadanashin* in whom the management of Muhammadan religious endowments is vested are not trustees within the meaning of the word as used in sec 10 of the Limitation Act, for the reason that the property does not vest in them. The result is that when a suit is brought against a person, not being an assign for valuable consideration, endowments of this nature are not protected. The Committee's recommendation is that section 10 of the Act should be amended so as to put Hindu and Muhammadan religious endowments on the same footing as other trust funds which definitely vest in a trustee. After consulting the Local Governments, the Government of India have come to the conclusion that Hindu, Muhammadan and Buddhist religious as well as charitable endowments should be included within the scope of section 10 of the Act. The Bill gives effect to this conclusion" (*Gazette of India*, 1927, Part V, p 223).

109. Specific Purpose .—The phrase "trust for a specific purpose" in this section is merely a more extended mode of expressing the same idea as that conveyed by the expression "express trust" in English law—*Vundravandas v. Cursonadas*, 21 Bom 646 (665); *Mathuradas v. Vandrawandas*, 31 Bom 222; *Kistappa Chetty v. Lakshmi*, 44 M.L.J. 431, 72 I.C. 842, A.I.R. 1923 Mad 578, *Ramacharya v. Srinivasacharya*, 20 Bom L.R. 441, 46 I.C. 19 (20). It is used in contradistinction to trusts arising by implication of law, trusts resulting and trusts constructive—*Bhurabhai v. Bai Ruxmani*, 32 Bom. 394. See also *Moosabhai v. Yacoobhai*, 29 Bom 267.

The words "in trust for a specific purpose" are intended to apply to trusts created for some defined or particular purpose or object as distinguished from trusts of a general nature such as the law imposes upon executors and others who hold recognised fiduciary positions. They are used in a restrictive sense and limit the character and nature of the trust attaching to the property which is sought to be followed—*Greender v. Mackintosh*, 4 Cal 897. To create an express trust within the meaning of this section, it must appear either from express words or clearly from the facts that the rightful owner of property has entrusted the property to the person alleged to be a trustee for the discharge of a particular obligation—*Barkat v. Daulat*, 4 All 187. It is not necessary that an express declaration should be proved. In England inferences drawn from the conduct of the parties have been held sufficient to establish an express trust, and the same principle should apply to trusts for a specific purpose within the meaning of sec. 10 of the Limitation Act—*Haribar Prasad v.*

Kesho Prasad, 5 P.L.T. Supp. 1, A.I.R. 1925 Pat. 68 A specific purpose is a purpose that is either actually and specifically defined in the terms of the deed by which the trust is created or a purpose which from the specified terms can be certainly affirmed—*Mahomedsa v. Khadirsa*, 29 Bom. L.R. 241, A.I.R. 1927 Bom 398, 103 I.C. 418; *Secretary of State v. Radhika Prasad Bapuli*, 46 Mad. 259 (290), 44 M.L.J. 685, A.I.R. 1923 Mad. 667, following *Khaw Sim Tek v. Chuah Hooi*, 49 I.A. 37 (43), 26 C.W.N. 495, A.I.R. 1922 P.C. 212, 102 I.C. 832.

Where a testator by his will dedicated two of his properties to his family deity and at the same time appointed his two wives and his adopted son as shebait, executrices and executor, they were clearly persons in whom the estate became vested in trust for a specific purpose within the meaning of this section—*Charu Chandra v. Nahush Chandra*, 36 C.L.J. 35, 50 Cal. 49 (66), 74 I.C. 630, A.I.R. 1923 Cal. 1. Two trusts were imposed upon the defendant; he was first of all under a trust to utilise part of the proceeds of a property for the expenses of a *darga*, and there was a second trust to pay a certain share of the surplus proceeds. Held that the second trust was an express trust under this section, as the property was vested in trust in the defendant for a specified purpose, viz, the purpose of division of surplus profits—*Mahomedsa v. Khadirsa*, 29 Bom L.R. 241, 103 I.C. 418, A.I.R. 1927 Bom 398. Where a widow handed over a certain sum of money to her brother for the benefit and education of her two sons, and the brother applied part of the money for that purpose, but put the balance into his pocket, held that the money was vested for a specific purpose, and a suit for account and refund of the balance fell under this section and was not barred by any length of time—*Chintaman v. Khanderao*, 52 Bom. 184, 30 Bom. L.R. 45, 107 I.C. 705, A.I.R. 1928 Bom. 58. A sum of money was handed over by a husband's father to the keeping of the wife's father as a fund constituting her *palla* or dowry in accordance with the usual practice prevailing in the caste. The fund was misappropriated by the lady's father and an action was brought to recover the same. Held that the property was vested in him for a specific purpose—*Bhurabhai v. Bai Ruxmani*, 32 Bom. 394, 10 Bom. L.R. 540. In 1860 certain shares in a Company then formed was allotted to S, on the understanding that 120 of such shares should, on the amount thereof being paid by the plaintiffs to S, be transferred to the plaintiffs. In 1862 the plaintiffs completed the payment to S in respect of the shares, and during his lifetime received dividends in respect of the said shares. S died in 1870. In a suit brought by the plaintiffs to compel S's executor (defendant) to transfer the shares to the plaintiffs, it was held that the transaction between S and the plaintiffs did not amount to "a trust for any specific purpose" within the meaning of sec. 10, or to a trust at all, but only to an agreement of which the plaintiffs were entitled to specific performance—*Ahmed v. Adjein*, 2 Cal. 323. Where a debtor, who was ignorant of the plaintiff's claim to the debt, paid the debt to the defendant, and the plaintiff brought a suit against the defendant for recovering the amount, it was held that

the money so received by the defendant was not held in trust for the plaintiff, as it was not vested for any specific purpose, and that the suit was not therefore protected from limitation but governed by article '61—*Arunachala v. Ramasamy*, 6 Mad. 402

P carried on a money-lending business, and entrusted the business to his brother-in-law S, who dealt with the property of P until P's death and even after that date remained in possession of all his property. The property consisted of money bonds, promissory notes and mortgage-deeds. Shortly before his death, P had directed S to hold his property for the benefit of his wife and daughter, and it also appeared in evidence that when S died in 1912 he informed P's wife and daughter that his (S's) son would continue to hold the property on their behalf. P's daughter brought the present suit in 1921 against S's son for an account. The contention was that the suit was barred by limitation. *Held* that the property had been legally vested in P in trust, and the specific purpose of the trust was to carry on the money-lending business and to increase the estate by addition of profits by way of interest and to hand over the property when called on to P. Section 10 therefore applied and the suit was not barred—*Pachaiyappa v. Sivakami*, 49 M.L.J. 468, A.I.R. 1926 Mad. 109, 91 I.C. 671. L was a partner in the firm of R, and as such was entitled to 35 shares of the Hongkong Mill and to a certain share of the commission earned by the firm as agents of the Mill. L retired from partnership and afterwards died, whereupon the present suit was brought by his executors against R to recover the share of L in the agency commission earned by the firm of R as agents of the Hongkong Mills. *Held* that L's share of the commission had become vested in trust for a specific purpose in the hands of R within the meaning of this section, and therefore the plaintiff's suit was not barred by limitation—*Narrondas v. Narrondas*, 31 Bom. 418. (The Rangoon High Court in 3 Rang. 206 doubts the correctness of this decision and says that it is clearly a case of constructive trust). A partition-deed entered into between two brothers recited that their deceased elder brother had entrusted a sum of money to them, and one of the two brothers undertook to pay the amount to the son of the deceased brother on his attaining majority, together with interest. *Held* that there was an express trust created in favour of the deceased brother's son, and a suit brought by him more than three years after attaining majority was not barred—*Md. Mathar v. Kara Rowther*, 20 L.W. 546, A.I.R. 1924 Mad. 920, 85 I.C. 509.

An executor who by the will is made an express trustee for certain purposes as regards some of the properties, cannot be regarded as "a trustee for a specific purpose" as to the residue of the properties for which no direction was given to the executor and no trust was declared—*Nanlal v. Hariochand*, 14 Bom. 476. But where the whole of the testator's property had been vested in the trustees, and after carrying out all the trusts under the will there was left with the trustees a residue undisposed of, in respect of which no trust was declared, it was held that as the whole of the testator's property had been vested in the trustees for a

specific purpose, it was not necessary that the trust of the residue should be specified in words in the will, and therefore the residue should be treated as vested in the trustees. A suit by the heir to recover the residue would not be barred at all—*Mojilal v Gourishankar*, 35 Bom 49. Where a will vested the whole of the testator's property in executors for certain purposes which eventually could not be carried out, it was held that the executors were not trustees for any specific purpose within the meaning of this section—*Vandravandas v. Cursondas*, 21 Bom. 646. Where a property is bequeathed to trustees for certain purposes some of which failed or are invalid, the heirs of the testator may be barred by the ordinary law of limitation from recovering the portion undisposed of, though they might still bring a suit against the trustees to compel them to properly administer the trusts that had not failed—*Hemangini v. Nobin*, 8 Cal. 788.

110. Resulting Trust :—This section does not apply where the object of the original trust being uncertain or undiscoverable, a resulting trust arises by operation of secs. 81 and 83 of the Indian Trusts Act, 1882—*Mathuradas v. Vandrawandas*, 31 Bom 222. A resulting trust is not an express trust or a trust for a specific purpose under this section—*Hemangini v. Nobin*, 8 Cal 788; *Kherodemoney v. Doorgamoney*, 4 Cal. 455 (470); *Mahammad Habibulla v. Safdar Hussein*, 7 All 25; *Casamally v. Currimbhoy*, 36 Bom. 214 (234); *Vandravandas v. Cursondas*, 21 Bom 646; *Churcher v. Martin*, (1889) 42 Ch D 312 (318); and a person claiming under a resulting trust may be barred by the ordinary law of limitation (Art 142, 144)—7 All 25; *Mohammad Ibrahim v. Abdul*, 37 Bom 447 (460); *Casamally v. Currimbhoy*, 36 Bom. 214.

Where the specific purpose for which the defendant became a trustee fails or is invalid, a resulting trust arises by operation of law in favour of the settlor or his heirs, and a suit by them to enforce such resulting trust is not within the scope of this section, because the plaintiffs are seeking not to enforce the original trust, but to defeat that trust. They are suing for the purpose of invalidating the disposition in furtherance of which the trust was created—*Kherodemoney v. Doorgamoney*, 4 Cal. 455 (465); *Hemangini v. Nobin*, 8 Cal. 788; *Cowasji v. R. D. Setna*, 20 Bom 511; *Mathuradas v. Vandrawandas*, 31 Bom. 222; *Gulzari Mal v. Kishan Chand*, 132 P.R. 1907; *Mahomed Ibrahim v. Abdul Latif*, 37 Bom 447.

111. Implied Trust :—Implied trusts, or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations are excluded by this section—*Kherodemoney v. Doorgamoney*, 4 Cal. 455; *Lakhraj v. Assamal*, 27 I.C. 332, 8 S.L.R. 132; *Hemangini v. Nobin*, 8 Cal. 788; *Mathuradas v. Vandrawandas*, 31 Bom. 222; *Robson v. Administrator-General*, 30 P.L.R. 503, A.I.R. 1929 Lah. 753 (757).

112. Constructive Trust :—Section 10 applies to cases of what in English law are called express trusts, and not to constructive trusts. The doctrine of the well known case of *Soar v. Ashwell*, [1893] 2 Q.B. 390, viz. that the rule of limitation will not be applied to certain kinds of constructive trusts, has no applicability to India—*Raja of Ramnad*

v. Ponnusami, 44 Mad. 277 (281), 40 M.L.J. 52, 1921 M.W.N. 37, *Ma Thein v. U Po*, 3 Rang. 206, 86 I.C. 297, A.I.R. 1925 Rang. 269, *Krishna Pattar v. Lakshmi Ammal*, 45 Mad. 415, 42 M.L.J. 119; *Robson v. Administrator-General*, 30 P.L.R. 503, A.I.R. 1929 Lah. 753 (757). Thus, where a person directs another to acquire property for him (the person directing) and furnishes some money for the purpose, but after some time he withdraws from the venture completely, but the person directed continues his exertions and entirely as the result of those exertions acquires the property, there is only a constructive trust, and section 10 does not apply—*Harihar Prosad v. Kesho Prosad* (Dumraon Case), 5 P.L.T. Supp. 1, A.I.R. 1925 Pat. 68. In one Allahabad case, however, which was really a hard case, the principle of this section was applied to a constructive trust. In that case, B and D, father and son, were jointly entitled to a moiety of certain property; B's brother E, and E's son K were jointly entitled to the other moiety. B and D were transported for life. Thirty years after (B having in the meantime died), D returned from transportation, and asserted his right to a moiety against a person deriving his title from E and K, who had taken possession of the whole. It was held, looking to all the circumstances of the case, that E and K had taken possession subject to a constructive trust in favour of B and D, and that accordingly D was entitled to assert his right, and no limitation could affect it—*Durga Prasad v. Asa Ram*, 2 All. 361. This case should not be treated as laying down any general principle to be applied to all cases of constructive trusts; and Straight J. who gave judgment in this case admitted in a subsequent case (5 All. 608 at p. 614) that his remarks in the previous case should be taken as confined to the particular circumstances of that case.

In England also, the bar of time runs in favour of a trustee where he is only a trustee constructively—*Hovenden v. Lord Annesley*, (1806) 2 Sch. & Lef. 633. So also, the bar of time runs in favour of a trustee who is only a trustee by implication of law upon some doubtful equity—*Townshend v. Townshend*, (1783) 1 Br. C. C. 550. Where the trust is not an express trust but is only a constructive trust, or the alleged express trust is in fact the point in dispute, the time runs in favour of the trustee—*Attorney-General v. Fishmongers' Co.*, (1841) 5 My. & Cr. 16; *Beckford v. Wade*, (1811) 17 Ves. 87; *Townshend v. Townshend* (supra).

113. Trustee not validly appointed :—This section applies even though the trustee was not validly appointed; and the defendant cannot plead the bar of limitation—*Subramania v. Subba*, 25 M.L.J. 452, 21 I.C. 421.

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111. Implied Trust :—Implied trusts, or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations are excluded by this section—*Kherodemoney v. Doorgamoney*, 4 Cal. 455; *Lakhray v. Assamal*, 27 I.C. 332, 8 S.L.R. 132; *Hemangini v. Nobin*, 8 Cal. 788; *Mathuradas v. Vandrawandas*, 31 Bom. 222; *Robson v. Administrator-General*, 30 P.L.R. 503, A.I.R. 1929 Lah 753 (757).

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113. Trustee not validly appointed :—This section applies even though the trustee was not validly appointed; and the defendant cannot plead the bar of limitation—*Subramania v Subba*, 25 M.L.J 452, 21 I.C. 421.

114. Legal representatives :—A new trustee succeeding to the office of a former trustee does not succeed to him *personally* and cannot be said to be his legal representative within the meaning of this section—*Manikkam v. Thanikachalam*, (1916) 2 M.W.N 87, 34 I.C. 945.

If the trustee is dead, a suit brought against his legal representative for following the trust property or for accounts is not barred by any length of time. It should be noted that if the suit against the legal

representative is to recover the specific trust property, sec. 10 applies and exempts the suit from the bar of limitation; but if the suit is not to recover any specific property but for compensation for loss of the property (the trust property having been sold by the trustee, or having disappeared and not being traceable), Art. 98 applies and the suit must be brought within 3 years. See Notes under Article 98. See also *Chintaman v. Khanderao*, 52 Bom. 184, 30 Bom. L.R. 45, A.I.R. 1928 Bom. 58.

115. Assigns for valuable consideration:—Section 10 of the Limitation Act does not apply to a suit against those who assert their right under a *bona fide* purchase for value—*Maniklal v. Manchershhi*, 1 Bom. 269; *Hait Ram v. Durga Prosad*, 5 All. 608. The period of limitation for a suit to follow property in the hands of assigns for valuable consideration is prescribed by Art. 134.

The meaning of this section is to declare that as a general rule trust properties shall not be subject to any law of limitation, that no length of time shall bar an action to recover such property; but that when trust property finds its way into the hands of an assignee for valuable consideration, the ordinary law of limitation shall apply; the assignee shall have the same benefit as an ordinary purchaser of property, not trust property, would have—*Chintamani v. Sarup se*, 15 Cal. 703

The words "assigns for valuable consideration" include lessees and mortgagees as well as purchasers—*Behari v. Muhammad*, 20 All. 482 (485) (F.B.). It also includes auction-purchasers. A suit against an auction-purchaser acquiring trust property for valuable consideration at a sale in execution of a decree is subject to the ordinary rule of limitation—*Chintamani v. Sarup*, 15 Cal. 703; *Subbaya v. Mahammad Mustapha*, 32 M.L.J. 85, affirmed by the Privy Council in 46 Mad. 751.

A gratuitous transferee is not an assignee for valuable consideration, and a suit for following the property in his hands is not barred by any length of time—*Venkatachala v. Sriranga Ammal*, 38 Mad. 1064.

The defendant purchased from one of two co-trustees of a temple the right to manage the affairs of the temple and enjoy certain land which formed the endowment of the temple, and held possession of the land for more than twelve years. It was held that a suit by the other trustee to recover the land was barred by limitation under Article 134, the defendant being an assign for valuable consideration—*Kannan v. Nilakandan*, 7 Mad. 337. Where the plaintiffs, who were managers of a temple, made a gift of a portion of the temple property to the defendants in consideration of the latter performing certain religious services at the temple, it was held that the latter were assigns for valuable consideration—*Ramacharya v. Srinivasacharya*, 20 Bom. L.R. 441, 46 I.C. 19.

To be an assign for valuable consideration for the purposes of this section or of Art. 134, good faith is not necessary—*Subbaya Pandaram v. Mahammad Mustapha*, 32 M.L.J. 85, 40 I.C. 50; *Ram Kanai v. Sri Sri Hari Narayan*, 2 C.L.J. 546. The words 'good faith' which occurred in this section in the Act of 1871 have been omitted in the Acts of 1877 and 1908. See this subject fully discussed in Note 564 under Article 134.

117. Following in his hands such property :—The words "for the purpose of following in his or their hands such property" mean "for the purpose of recovering the property for the benefit of the trust in respect of which it had been given"—*Balwant Rao v. Puran Mal*, 6 All. 1 (P.C.); *Mahomedsa v. Khadisa*, 29 Bom. L.R. 241, A.I.R. 1927 Bom. 398, 103 I.C. 418; therefore, where there is no question whether the property is being applied or not to the purposes of the trust, and the suit is for the enforcement of the plaintiff's personal right to manage it, this section does not apply—*Balwant v. Puran Mal* (supra)

This section does not apply to a suit brought on failure of the object of a trust, to recover the money remaining in the hands of the trustee, for the plaintiff's own benefit and not with the object of having such money applied towards the original purposes of the trust—*Jasoda v. Parmanand*, 16 All. 256. A suit brought to vindicate the rights of the plaintiffs as co-trustees with the defendants and to protect their own interest, and not, except indirectly, the interests of the temple, cannot be regarded as falling within this section—*Ranga v. Baba*, 20 Mad 398.

Where a testator's grand-daughter brought a suit as his heir and not under the will, against the executors of the will, for a declaration that she was absolutely entitled to the property of her grand-father and for an account, it was held that the suit was not one for the purpose of following such property in the hands of the executors or trustees, and that as the plaintiff took no interest in the property under the will, and the executors were not trustees for her and the property did not vest in them for any specific purpose in her favour, this section did not apply and she was only entitled to six years' accounts—*Ajeshabai v Ebrahim*, 32 Bom 364

A suit to remove the trustees of certain debuttur property, to establish the plaintiff's claim to be appointed trustee, and to recover property improperly dealt with by the defendant in breach of the trust, is one for "the purpose of following the property in the hands of trustees" and therefore limitation does not run—*Sreenath v Radha Nath*, 12 C.L.R. 370

A suit by the trustee to recover the property of a temple from an ex-trustee who has been dismissed by the temple committee, is within this section—*Virasami v. Subba*, 6 Mad 54; *Subrahmanya v. Subba Naidu*, 25 M.L.J. 452, 21 I.C. 421.

A suit against trustees for the purpose of charging certain property with the trusts declared by the author of the trust in respect of that property, and for an account, is a suit to follow property, and as such is not barred by any lapse of time—*Hurro Coomaree v Tarani*, 8 Cal 766.

A suit to prevent a specific endowment from being diverted from its legitimate object and to re-attach it to that object is within this section—*Sathappayar v Periasami*, 14 Mad. 1; *Advocate General v. Bai Panjabai*, 18 Bom. 551. A suit against the manager of a Hindu temple for recovering money misappropriated by him falls under this section—*Sethu v. Subramanya*, 11 Mad. 274. The present manager of a Mutt is entitled to sue the assigns of his predecessor in office on the ground that the assignment was in violation of his trust, and such a suit falls within this section

—*Sathinama v. Saravanabaji*, 18 Mad 266; *Mahomed v. Ganapati*, 13 Mad. 277; *Jamal v. Murgaya*, 10 Bom. 34. A suit for a declaration and possession of certain properties instituted by the plaintiff against his father whom his maternal grandfather had appointed trustee for the benefit of the plaintiff and of his mother (who died about 17 years before suit) was not barred by limitation, as it came under this section—*Sethu v. Krishna*, 14 Mad. 61.

A suit by the *dwaries* of a temple for recovery of certain dues claimed by them as payable as remuneration in respect of their services in connection with the temple is not a suit covered by this section. The plaintiffs are no doubt entitled, out of the proceeds of the property belonging to the temple, to certain payments in the nature of wages and remuneration, but they cannot be said to be bringing the suit for the purpose of following the trust property in the hands of the trustee—*Sri Sri Baidyanath v. Har Datt*, 5 Pat. 249, 7 P.L.T. 465, A.I.R. 1926 Pat. 205, 94 I.C. 826.

"Or the proceeds thereof" :—It is not necessary that the suit should be to follow the original trust property only; for if the trust property has been tortiously disposed of by the trustee, the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust property, so long as the metamorphosis can be traced—*Taylor v. Plumer*, 3 M. & S. 574.

117A. Suits under this section :—Sec. 10 of the old Act did not apply to a suit for account. Where the object of a suit by a *cestui que trust* was not to follow trust property in the hands of the trustee, but only to have an account of the property or the proceeds, section 10 of the old Act did not apply and such a suit was governed by Art. 120—*Saroda Prasad v. Brojo Nath*, 5 Cal. 910; *Shapurji v. Bhikaji*, 10 Bom. 242; *Baroda Prasad v. Gajendra*, 13 C.W.N. 557, 9 C.L.J. 383. In another Bombay case it was held that a suit for an account of the trust property was the same thing as a suit for following the trust property in the hands of the trustee—*Gajanan v. Waman*, 12 Bom L.R. 881, 8 I.C. 189 (190). The present Act expressly extends the application of this section to suits for accounts—*Dhanpat v. Mohesh*, 24 C.W.N. 752 (755). In England also, actions against express trustees claiming an account of the trust property cannot be barred by the Statute of Limitation—*Rochefoucault v. Bowstead*, [1897] 1 Ch. 196 (208); *North America Co v. Watkins*, [1904] 1 Ch. 242.

This section applies only to a suit for an account of the property which actually came into the hands of the trustee. But where it is sought to render a trustee liable for property which but for his wilful default or negligence would have come into his hands, the ordinary law of limitation applies, and it is not saved by this section—*Tholasingum v. Vedachelayya*, 41 Mad. 319.

This section prevents the period of limitation running, not only where the defendant had actually received money as trustee for which he had not accounted, but also where he held money in another capacity which he ought to have held as trustee. In such a case he cannot be heard to say

that he held it in the other capacity and not in the capacity of a trustee; and therefore in such a case section 10 will apply and prevent him from relying upon the Limitation Act. But a suit based on the failure of a trustee to reduce trust property into possession is barred under this Act, notwithstanding sec. 10. A trustee is not liable for the acts or defaults of his predecessors. Trustees are relieved from indefinite liability, except in cases of fraud or fraudulent breach of trust or cases in respect of trust property or the proceeds thereof still retained by trustees or previously received by them and converted to their own use—*Doraivela v. Adikesavelu*, 1922 M.W.N. 620, A.I.R. 1922 Mad. 409, 70 I.C. 87.

118. Suits not within this section :—A suit by a legatee who has received a portion of the legacy, against the executor, to be put in possession of the remaining portion of the legacy, is not a suit falling under this section but governed by Article 120—*Gajanan v. Waman*, 12 Bom.L.R. 881, 8 I.C. 189 (190). A claim to vindicate the personal right of a trustee to the possession or management of an immoveable property against another person claiming such right in the same character is not governed by this section—*Karimsha v. Nattan*, 7 Mad. 417; *Giyana Sambandha v. Kandasami*, 10 Mad 375; *Nilakandan v. Padmanabha*, 14 Mad. 153; *Sankaran v. Krishna*, 16 Mad. 456; *Nathe Pujari v. Radha Binode*, 3 P.L.J. 327; *Ambalavana Pandara v. Minakshy*, 28 M.L.J. 217, 20 I.C. 841.

Where trust property was sold as the personal property of the trustee at an execution sale, and the auction-purchaser was in possession for more than 12 years, a suit by the successor of the original trustee against the purchaser for recovery of the property does not fall under this section but is barred by the 12 years' rule—*Subbaya Pandaram v. Mahammad Mustapha*, 32 M.L.J. 85, affirmed by the Privy Council in 46 Mad 751.

11. (1) Suits instituted in British India on contracts entered into in a foreign country are subject to the rules of limitation contained in this Act.

Suits on foreign contracts.

(2) No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract and the parties were domiciled in such country during the period prescribed by such rule.

119. Principle :—Sub-section (1) is a legislative enactment of the rule of international jurisprudence that "all suits must be brought within the period prescribed by the local law of the country where the suit is brought, otherwise the suit will be barred"—Story's Conflict of Laws, Sec 577, cited in *Lalloobhoy v. Ruckmaboye*, 5 M.I.A. 234 (at p 267). "It is a rule of universal (or almost universal) application that remedies as distinguished from rights are to be pursued according to the

law of the place where the action is instituted, which law is commonly called the *lex fori*. And the reason of the rule is, because Courts of law being instituted by every nation for its own convenience, the nature of the remedies available therein and the times and modes of the proceedings therein are regulated by that nation's own views of what is just and proper or expedient; and it is not obliged, out of any comity to other countries, to depart (in a matter of procedure) from its own notions of what is just or proper or expedient. And therefore, where an action is brought in one country upon a contract made in another, a plea of the statute existing in the place of the contract is not a good bar in the general case"—Banning, 3rd Edn., p. 11; *Huber v. Steiner*, (1835) 2 Bing. N. C. 202; *Pardo v. Bingham*, (1870) L.R. 4 Ch. App. 735; *Harris v. Quine*, (1870) L.R. 4 Q.B. 653; *Alliance Bank of Simla v. Carey*, (1880) 5 C.P.D. 429.

"The rule which applies to the case of contracts made in one country and put in suit in the Courts of another country appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made, the mode of suing and the time within which the action is to be brought must be governed by the law of the country where the action is brought"—*Trimbey v. Vignier*, 1 Bing. N. S. 151. While the Courts of almost all civilized countries entertain causes of action which have originated in a foreign country and adjudicate upon them according to the law of the country in which they arose, yet such Courts respectively proceed according to the prescription of the country in which they exercise jurisdiction—*Laloobhoy v. Ruckmaboye*, 5 M.I.A. 234 (at p. 266). In matters of procedure all mankind are bound by the law of the *forum*—*Lopez v. Burslem*, 4 Moo P.C. 300.

Although this section speaks of suits on contract only, yet the principle of this section applies to all suits and proceedings. Thus, the execution of decrees of Courts of Native States transferred to a Court of British India for execution is subject to the law of limitation which prevails in the latter Court—*Hukum v. Gyanendar*, 14 Cal 570.

120. Sub-section (2) :—This sub-section also follows the English law, according to which a foreign law of limitation is preferred to the *lex fori* on two conditions; (1) that the foreign law extinguishes the right or the obligation itself, and (2) that both the parties have resided in the country where such law prevails for the whole of the prescribed time. See Story's Conflict of Laws, sec. 582.

It is immaterial whether the foreign law allows a longer or a shorter period. Provided that the foreign law does not extinguish the right under the contract, no effect can be given to such law—*Huber v. Steiner*, 2 Bing. N.S. 202. Where the remedy only is barred by the foreign law, a suit may be instituted in the Court of British India if it is not then barred according to the Indian law of limitation—*Nallatami v. Ponnusami*, 2 Mad. 400; *Narronji v. Magniram*, 6 Bom. 103.

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

12. (1) In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

The periods of limitation prescribed in Schedule I are to be computed subject to the provisions contained in this section—*Dhonesur v. Roy Gooder*, 2 Cal. 336 (F B.).

121. Sub-section (1) .—The meaning of the first paragraph is that the date of accrual of the cause of action should be excluded—*Chinna v. Ramaswamy*, 4 M.H.C.R. 409; *Ganapati v. Sitharama*, 10 Mad. 292. "The reason of the rule appears to be this, namely, the law does not as a rule regard the fraction of a day, so much so that the date of the execution of a deed does not mean the hour or the minute of the day when the deed was delivered, but means the whole day; and similarly the day of the death of a testator is the day of the death, and if it is necessary to reckon six months after the death, those six months will commence with the day next following the death"—*Banning*, 3rd Edn., p. 20; *Lester v. Garland*, (1808) 15 Ves 248; *Webb v. Fairman*, (1836) 3 M. & W. 473; *Chambers v. Smith*, (1843) 12 M. & W. 2; *In re Railway Sleepers Co.*, (1883) 29 Ch D. 204.

In computing a calendar month or year, it is sufficient to go from one month or year to the corresponding day in the next, and to exclude from

computation the day from which the month or the year is calculated, so that two days of the same number are not included—*Deb Narain v. Ishan*, 13 C.L.R. 153. In a suit on a bond where a day is specified for payment, the period of limitation is to be computed from and exclusive of the day so specified, as being the day on which the right to sue accrued—*Ram Churn v. Ina*, 24 W.R. 463. In case of a pro-note, the date on which the pro-note is executed will be excluded—*Munshi Abdul v. Tara-chand*, 6 B.L.R. 292.

When a debt is acknowledged in writing, a new period of limitation runs under s. 19 from the date of the acknowledgment, and the day on which the acknowledgment was signed must be excluded in computing the new period of limitation, under sub-section (1) of section 12—*Jainarayan v. Vithoba*, 6 N.L.J. 281, A.I.R. 1923 Nag. 143, 71 I.C. 556.

The day on which a minor attains his majority must be excluded under this section—*Jugmohan v. Luchmeshur*, 10 Cal. 748 (751).

In calculating the period of limitation for appeals and applications, the day on which the judgment was pronounced or order was made should be excluded—*Debicharan v. Mehdi Hussain*, 20 C.W.N. 1303, 1 P.L.J. 485 (489); *Gujar v. Barve*, 2 Bom. 673. See sub-section (2).

Sub-section (2) :—This sub-section does not apply to an application for restoration of a suit dismissed for default. The language of the section is clear—*Mohan Lal v. Sher Muhammad*, 93 I.C. 1023, A.I.R. 1926 Jour. 195.

122. "Time requisite for copy" :—The 'time requisite for obtaining a copy' does not mean the time requisite by reason of the carelessness or negligence of the applicant. That is, the delay caused by the negligence of the party in applying for a copy or in paying the money required for a copy cannot be excluded from computation—*Parvati v. Bhola*, 12 All. 79. In determining what is the "time requisite" in sub-section (2) of sec. 12, the conduct of the appellant must be considered, and no period can be regarded as requisite under the Act which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order—*Pramatha v. Lee*, 49 Cal. 999 (P.C.), 27 C.W.N. 156, 37 C.L.J. 86. The word 'requisite' is a strong word; it may be regarded as meaning something more than the word 'required'. It means 'properly required', and it throws upon the counsel or pleader for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default—*J. N. Surty v. Chettiar*, 6 Rang. 302, A.I.R. 1928 P.C. 103, 32 C.W.N. 845 (849). Thus, where according to the rules of the High Court (original side) it is incumbent upon the appellant to make an application for the drawing up of the order appealed against, and the party who wanted to prefer an appeal applied for a copy of the order, but did not put in a requisition for the order being drawn up, and it was the respondent who applied for the drawing up of the order, *held* that the appellant has not taken reasonable and proper steps to obtain a copy of the order, and he is not entitled to a deduction of the period from the date of the application

for a copy of the order up to the date of obtaining the copy—*Kamruddin v. M. N. Mitter*, 52 Cal. 342, 89 I.C. 277, A.I.R. 1925 Cal. 735. Any failure in reasonable diligence which produces unnecessary delay at one or more of the several stages in obtaining a copy of the decree, order or judgment, will disentitle the appellant to claim the whole of the time actually spent in obtaining the copy of the order. The time unnecessarily occupied is not time 'requisite' within the meaning of this section—*Sarat Chandra v. Upendra Nath*, 54 Cal. 481, 103 I.C. 235, A.I.R. 1927 Cal. 623. But a party is not to lose his right of appeal by reason of the neglect or delay of the officials who issue copies or who are required to give notice when such copies are ready—*Shegobind v. Ablakhi*, 12 All 105.

When the plaintiff allowed five days to expire after the decree was signed before applying for a copy, and did not file his appeal, after so obtaining a copy, at the earliest opportunity possible but two days after, such a delay, being entirely unaccounted for, was not held to be "time requisite for obtaining a copy of the decree"—*Ramey v. Broughton*, 10 Cal 652 (660).

This section does not authorise the deduction of time occupied in getting a translation of the decree. Thus, where the decree of the first Court was drawn up in English, but the appellant wanted and obtained a vernacular copy of the decree, and filed it along with the memorandum of appeal in the lower Appellate Court, it was held that the time spent in obtaining the vernacular copy could not be excluded in computing the period of limitation for the presentation of an appeal, in as much as the practice of the lower Appellate Court required an English copy of the decree to be filed with the memorandum and not a translation thereof—*Muhammad Amin v Chiragh*, 124 P L R 1917, 39 I C 617. But if there has been extreme delay in the office in furnishing the translation, such delay may be a ground for extending the time—*Daya Kaur v Amrao Kaur*, 145 P R. 1883.

An appellant is entitled to deduct the time spent in obtaining a copy of the first judgment of the trial court as well as of the judgment passed on review. Where the judgment passed on review does not give all the facts of the case but is merely supplementary to the first judgment, in as much as it modifies a portion of the first, it is necessary for the appellant to file copies of both the judgments, as the two must be regarded as one judgment, and the time spent in obtaining both the copies must be deducted—*Jagiri v Daulat*, A.I.R. 1928 Lah. 755 (756), 112 I C. 46.

123. Computation of time requisite for obtaining copies :—The question as to when the period requisite for taking copies should begin, that is, whether on the day the application for copy is made or on the day on which the folios and fees for the copy are deposited, is a matter to be determined by the practice of the Court—*Nobin v. Brojendra*, 12 C L R 541. The general practice is to count the period requisite for copies from the date of the application for the copy and not from the date of deposit of the folios. Thus, where a party applied for a copy of the decree on the 15th October and the information as to the

number of folios required was supplied on the 18th November, and on the same day the party put in the folios, *held* that the time requisite for obtaining the copy of the decree was to be counted from the 15th October—*Kali Sankar v. Baikanta*, 7 C.W.N. 109. Where it was notified by the Court to the appellant as to the number of stamps and folios necessary for preparing copies of judgment and decree, and the appellant supplied them in time, but the Court subsequently asked for more folios which were *not necessary*, and which the appellant supplied after great delay, *held* that this delay in supplying the additional and unnecessary folios should not count against the appellant—*Adarpriya v. Ramprotap*, 30 C.W.N. 926, A.I.R. 1926 Cal. 1105, 98 I.C. 748. According to the practice of the Oudh Chief Court, it is for the appellant to make the necessary calculation as to the fees necessary for the copy of the judgment, and to deposit the fees accordingly; it is not the duty of the office to make the calculation for the appellant, but only to check the calculation made by the appellant. Consequently, any delay caused by the error of the appellant in making the computation will not be included in the time requisite for obtaining the copy—*Gudar Pal v. Nagishar*, 2 Luck. 447 (F.B.), A.I.R. 1927 Oudh 129, 101 I.C. 136. The delay in paying the fees after the estimate of the cost of paying has been communicated to the applicant counts against him. In such a case the "time requisite" will be counted from the date of deposit of the fees—*Parbat v. Bhola*, 12 All. 79 (82); *Ram Asray v. Sheo Nandan*, 1 P.L.J. 573, 35 I.C. 868; *Kaveribai v. Chandrabhagabai*, 4 C.P.L.R. 188; *Deoki Lal v. Ramanand Lal*, 5 P.L.J. 701 (705), 59 I.C. 179; *Topandas v. Manager*, 5 S.L.R. 47, 10 I.C. 210. The parties cannot, by unnecessary delay in putting in the requisite number of sheets of stamped paper for the copies, extend the period prescribed for appeal. But it would be grossly unfair to disallow the application if the requisite papers were not procurable, or if a mistake were made in calculating the number of sheets required—*Gungadass v. Ramjoy*, 12 Cal. 30. Sometimes delay might be caused in the receipt by the office of the estimated charges owing to the stamps not being procurable, or to the office not being open to receive payment of those charges when the estimate should have been complied with. Such period of delay, as well as delays arising from similar causes beyond the control of the appellant, and not being the result of any laches on his part, should be allowed in computing the time requisite—*Bechi v. Ahsanullah*, 12 All. 461 (478, 491). The time requisite for obtaining a copy of the order appealed against begins from the date on which the application for copy is made, and not from the date on which the appellant has made a requisition that the order should be drawn up and filed. Such a requisition does not bring the case within sub-section (2) of sec. 12—*Nibaran Chandra v. Martin and Co*, 32 C.L.J. 127, 58 I.C. 408 (409).

Under sub-section (2) the day on which the judgment is pronounced and the time requisite for obtaining copies are excluded from computation. But where an application for copies is made on the same day the judgment is pronounced, that day cannot be excluded twice, once as the day on which the judgment was pronounced, and the second time as one of the

days requisite for obtaining copies. In such a case, the day on which the judgment is pronounced is excluded first, and then the time requisite for obtaining copies has to be excluded—*Ata Muhammad v. Pir Khan*, 75 I.C. 1055, A.I.R. 1924 Lah. 599; *Salam Singh v. Hira*, 13 N.L.R. 89, 40 I.C. 425.

According to the practice of the Patna High Court, when several suits are disposed of in one judgment, in an appeal to the High Court only one copy of the judgment is required to be filed; but the time taken for obtaining a copy of the judgment will be deducted in computing the period of limitation for each of the several analogous appeals—*Bibi Umatul v. Ram Charan*, 1 P.L.T. 562, 58 I.C. 991.

The time requisite for obtaining a copy ends on the date when the copy is ready for delivery and not when the applicant chooses to apply for its delivery or actually takes delivery—*Gopal v. Brojo Behary*, 9 C.L.R. 293; *Parbati v. Bhola*, 12 All. 79; *Kali Sankar v. Baikanta*, 7 C.W.N. 109; *Tolaram v. Jaffer Khan*, 38 I.C. 464, 10 S.L.R. 165. The important date is not the date on which the appellant takes delivery but the date on which the copy is ready for delivery, provided he had notice that the copy would be ready on that date—*Parbati v. Bhola*, supra; and if an appellant fails to inform himself of the date when the copy would be ready, and in consequence he does not obtain it when it is ready for delivery, the period of such delay is not to be included in the time requisite—*Sheogobind v. Ablakhi*, 12 All. 105. What has to be regarded is not the time actually spent in securing the copies, but the time "requisite" for that purpose; therefore the appellant was not entitled to reckon out the days during which the copy of the judgment lay undelivered—*Nur Muhammad v. Ram Das*, 1919 P.L.R. 4, 50 I.C. 760.

Where the appellant was instructed to attend Court on a particular day to ascertain whether the copies were ready or whether any further advance of copying fees was required, and the appellant did not so attend, and did not on that day take any particular steps towards obtaining the copy, it was held that that day could not be deducted from the limitation period as "time requisite for obtaining the copy"—*Lachman v. Kalya*, 12 N.L.R. 66, 34 I.C. 458.

Defective application for copy—A defective application for copy does not entitle the applicant to a deduction of time under this section. Thus, an application for copy of a decree was returned as the date of judgment or other particulars were not given. A subsequent application was put in. Held that the time that could be deducted was not the whole period of time from the putting in of the first application, but only the period during which the second application was pending—*Babu Lal v. Rampher*, 91 I.C. 425 (Oudh). See also *B. B. & C. I Ry Co. v. Firm Ram Sarup*, A.I.R. 1927 Lah. 59, 93 I.C. 942. But where an application for copies of judgment and decree was struck off for non-deposit of stamp papers and a subsequent application for restoration of the previous application was granted, the subsequent application was a continuation of the former one—*Ramanuja v. Narayana*, 18 Mad. 374.

124. Court closed when copy ready :—If the copying department of the Court is working during the vacation to make up arrears, under the special order of the District Judge, and the copy of the decree is ready for delivery on one of these days and notice is posted on the notice-board that the copy is ready, the appellant is not bound to take cognisance of this notice or to take delivery of the copy until the Court re-opens after the vacation; he is entitled to deduct the time up to the date of re-opening of the Court—*Khush Chand v. Harmukh*, 34 All. 41, 8 A.L.J. 1095, 12 I.C. 183. But where in accordance with the High Court's Rules, a notification had been published that arrangements would be made for granting copies during the vacation, held that all steps for obtaining copies must be taken during the vacation, and the period between the date on which the copies were ready for delivery during the vacation and the day of reopening of Court will not be deducted as time requisite for obtaining copies—*Appalaswami v. Narayanaswami*, 36 M.L.J. 62, 49 I.C. 626. Where printing charges for copies were called for on the last Court day before the vacation, and they were paid only on the reopening of the Court, but there was a notification that arrangements would be made for granting copies during the vacation, held that the period of the vacation could not be deemed as part of the period requisite for obtaining the copies—*Kadir Mohideen v. Syed Abubakkar*, 36 M.L.J. 122, 50 I.C. 518 (519).

125. Copy sent by post .—Where a copy of the judgment and decree is applied for and sent by post in accordance with the rules for the supply of copies through the post, the period intervening between the completion and the despatch of the copies should be included in the time requisite for obtaining the copies. That is, the time to be allowed for granting copies should be calculated from the date of application up to the date when the copies are despatched, and not up to the date when the copies are ready for delivery—*Allah Bakhsh v. Municipal Committee*, 27 P.L.R. 18, A.I.R. 1926 Lah. 223, 92 I.C. 966; *Krishna v. Balia*, 8 N.L.R. 11, 14 I.C. 403; *Paga v. Sadasheo*, 8 N.L.R. 172, 17 I.C. 624; *Raghu v. Mandgia*, 10 N.L.R. 139, 26 I.C. 819; *Ghulla Singh v. Sohan*, 3 Lah. 280, A.I.R. 1922 Lah. 219, 69 I.C. 818; *Iqbal Jehan v. Mathura*, 6 O.L.J. 660, 54 I.C. 831 (Oudh). Even though the applicant could have got his copies several days earlier by presenting himself at the Court, he does not forfeit his claim to indulgence because he arranged to have the copies sent by post. These days cannot be excluded from computation under sec. 12, but they may be excluded in considering the question of indulgence under sec. 5—*Sripat v. Hubdar*, 2 O.W.N. 678, 90 I.C. 115, A.I.R. 1925 Oudh 643. See also *Madan v. Puran*, A.I.R. 1926 Lah. 84, 26 P.L.R. 738, 91 I.C. 6. The applicant for copy of the decree was not told when the copy would be ready; and after the copy was ready, it was kept in the office for 15 days, and afterwards sent by post to the applicant, who filed the appeal on the very day he received the copy. Held that the appeal ought to be accepted—*Madan v. Puran*, supra.

126. Separate applications for copies of judgment and decree :—Where a party applies for copies of judgment and of decree at different times, the aggregate of the periods may be deducted under sub-sections (2) and (3)—*Selamban v. Ramanadhan*, 33 Mad. 256; *Vellayammal v. Koolayanpa*, 41 M.L.J. 273; *Rajani Kanta v. Kali Mohan*, 21 C.W.N. 217, 38 I.C. 66; *Macmillan and Co., Ltd. v. Cooper*, 48 Bom. 292, 25 Bom. L.R. 1309, A.I.R. 1924 Bom. 185; *Timappa v. Manjaya*, 48 Bom. 433, 26 Bom. L.R. 362, A.I.R. 1924 Bom. 425; *Jadunandan v. Hanuman*, 4 P.L.T. 619, A.I.R. 1924 Pat 113, 77 I.C. 701; *Narasimhulu v. Secy. of State*, 1912 M.W.N. 1001, 17 I.C. 393, *Raman Chetty v. Kadirvelu*, 8 M.L.J. 148. The Punjab Chief Court once held that the mere fact that a party applied for copies of judgment and decree at different times, did not entitle him to a deduction of both the periods. An appellant could deduct only the time actually requisite for obtaining copies. The question whether, when it was open to a party to apply for both copies of judgment and decree at once, he could apply first for one and then for the other, and claim to exclude the two periods as both requisite, was held to be a question of fact to be decided on the circumstances of the case, and not a question of law—*Sher Singh v. Prem Raj*, 100 P.R. 1918, 48 I.C. 31. But in more recent cases, the Lahore High Court has held that the appellant is not bound to ask for both copies in the same application; and he is entitled to apply for copies of the judgment and the decree at two different periods, and to deduct the time requisite for obtaining a copy of the decree as well as the time requisite for obtaining a copy of the judgment under sub-sections (2) and (3) respectively—*Ali Muhammad v. Nathu*, 163 P.R. 1919, 54 I.C. 879, 1 Lah.L.J. 106; *Kanshi Ram v. Karam Narain*, 3 Lah.L.J. 166, 60 I.C. 259, A.I.R. 1921 Lah 124.

Where some portions of these two periods overlap each other, the time overlapped should be excluded only once—*Rajani Kanta v. Kali Mohan*, 21 C.W.N. 217, 38 I.C. 66; *Ramzan v. Md. Ishaq*, 47 All. 509, A.I.R. 1925 All. 436, 23 A.L.J. 342; *Raman Chetty v. Kadirvelu*, 8 M.L.J. 148; *Macmillan and Co. Ltd. v. Cooper*, 48 Bom. 292, 25 Bom. L.R. 1309, A.I.R. 1924 Bom. 185; *Sundar Nag v. Raghunath*, 12 I.C. 677; *Badshah v. Pandurang*, 26 N.L.R. 66 (F.B.), A.I.R. 1930 Nag 113.

Applications for copies of the judgment and the decree must be made before the expiry of the time for filing an appeal. Now, it is settled by authorities that the applications made at different times entitle the appellant to take advantage of the time occupied in obtaining copies of both judgment and decree. Hence, if the time requisite for obtaining a copy of the judgment extends the time of limitation, then the application made for obtaining a copy of the decree after the time fixed by the law of limitation for filing an appeal but before the extension of time allowed by reason of time required for obtaining the copy of the judgment expires, will entitle the appellant to further extension of time for obtaining the copy of the decree—*Jadunandan v. Hanuman*, 4 P.L.T. 619, 77 I.C. 701, A.I.R. 1924 Pat 113; *Ramzan v. Md. Ishaq*, 47 All. 509, 23 A.L.J. 342, 87 I.C. 484, A.I.R. 1925 All. 436; *Rajani Kanta v.*

Kali Mohan, 21 C.W.N. 217; *Selamban Chetty v. Ramanadhan*, 33 Mad. 256, 21 M.L.J. 152, 4 I.C. 301; *Raja Ram v. Nanhe Mal*, 95 I.C. 302, A.I.R. 1926 Lah. 529; *Harjimal v. Dhanpatmal*, 15 S.L.R. 16, 62 I.C. 537; *Ramchandra v. Mayaram*, A.I.R. 1928 Nag. 131; *Din Dayal v. Rameshwar*, 18 O.C. 74, 2 O.L.J. 159, 28 I.C. 366; *Badshah v. Pandurang*, 26 N.L.R. 66 (F.B.), A.I.R. 1930 Nag. 113 (overruling *Parasram v. Likhani*, 7 N.L.R. 67, 10 I.C. 866). The law does not require that the copies of both judgment and decree must be applied for simultaneously; it is a well recognised practice for an unsuccessful litigant to obtain a copy of the judgment first so that he may consider whether he will appeal or not; and then he may apply for a copy of the decree. In such a case, the aggregate period taken in obtaining copies of judgment and decree will be excluded—*Ramachandra v. Mayaram*, 106 I.C. 57, A.I.R. 1928 Nag. 131 (132). --

127. Non-signing of decree :—Where the intending appellant having applied for certified copies of the judgment and decree, the copy of the judgment was delivered to him and at the same time an unused folio and the Court fee filed for the copy of the decree were also returned because the decree had not been signed, and the applicant had to make a fresh application for a copy of the decree after it had been signed, held that the first application for a copy of the decree should be treated as pending all the time, so that the applicant would be entitled to the deduction of the time between the signing of the decree and the date when the copy of the decree was ready for delivery—*Tarabati v. Lala Jagdeo*, 15 C.W.N. 787, 10 I.C. 542.

The date of the decree is for the purposes of this Act the date of the judgment. But if the decree appealed against is not signed until a date subsequent to the date of delivery of judgment, the period between the date of the judgment and the date of signing the decree shall not be excluded, unless the appellant has applied for a copy of the decree before it is signed and has been delayed by reason of the decree not having been signed—*Parbati v. Bhola*, 12 All. 79; *Maung Po v. Ma Lay*, 7 Rang. 18, A.I.R. 1929 Rang. 116; *Topandas v. Manager*, 5 S.L.R. 47, 10 I.C. 210; *Khudadad v. Moriokhan*, 9 S.L.R. 193, 34 I.C. 867. The principle is that the "time requisite for copy" does not begin until an application for a copy has been made, and the period during which the decree remained unsigned (i.e. the period between the date of judgment and the date of signing the decree) cannot be excluded unless the application for a copy of the decree has been made before it is signed; therefore, where the appellant has made no application for copies of judgment and decree until after the expiry of the period of limitation prescribed for filing the appeal, he is not entitled to ask the Court to deduct the period between the date of the judgment and the date of signing the decree, because in such a case it can not be said that he was prevented from filing his application for copy by reason of the decree not being signed—*Bechi v. Ahsanullah*, 12 All. 461 (F.B.); *Jyotindra v. Lodna Colliery Co. Ltd.*, 6 P.L.J. 350 (F.B.), 2 P.L.T. 361, 62 I.C. 649; *Harish Chandra v. Chandpur Co. Ltd.*, 39 Cal. 766, 15

I.C. 59 "It appears to me upon general principles that it would be defeating the object of limitation to allow the would-be appellant to sleep over his right of appeal for more than the limitation period, and then, by the accidental or unavoidable delay in the decree being prepared, to claim extension of the period of limitation for appealing from a decree, for obtaining a copy of which he had not taken even the first step by filing an application therefor. The words 'requisite' and 'obtaining' as they occur in the context seem to assume that some definite step ancillary to the obtaining is not only intended to be taken but has already been taken. If at the time when the application for copy is made, the decree is not ready, he will of course be entitled to the allowance of the time during which the decree remained unsigned, the reason being obvious that the act of obtaining has already commenced and the delay in such a case could not be referred to any omission or neglect on his part. But when he has made *no application* to obtain a copy, and the decree remains unsigned for a portion of or the whole period of limitation, he cannot claim the benefit of a matter which in no sense and to no extent frustrated or retarded any endeavour on his part to obtain a copy of the decree, the endeavour itself not having yet commenced."—*Bechi v. Ahsanullah*, 12 All. 461 (471) (F.B.). See also *Raja Mahommed v. Lal Bahadur*, 12 O.L.J. 444, 2 O.W.N. 420, A.I.R. 1925 Oudh 600, 89 I.C. 479. Where an application for copy of the decree was presented before the signing of the decree, but upon a wrong statement of the clerk of the court that the application for copy would not be accepted unless the decree was drawn up, the application was withdrawn, held that this was not an effective application for a copy of the decree, and the time between the date of judgment and the date of signing the decree could not be deducted—*Maung Po v. Ma Lay*, 7 Rang 18, 117 I.C. 251, A.I.R. 1929 Rang 116. In cases where the appellant has applied for copies after the decree has been signed, the only periods that can be excluded under sub-section (2) are the day on which the judgment is pronounced, and the time requisite for obtaining a copy of the decree. No other period can be deducted, in such a case, even on the highest principles of equity, and therefore the time between the pronouncement of the judgment and the signing of the decree cannot be deducted—*Dindayal v. Anopi*, 22 N.L.R. 60, A.I.R. 1926 Nag 349, 97 I.C. 307; *Umda v. Rupchand*, A.I.R. 1927 Nag 1, 98 I.C. 1057.

In an earlier Full Bench case of the Calcutta High Court it was held that the time between the date of judgment and the date of signing the decree must be deducted from computation, even though an application for a copy of the decree was made after it was signed—*Bani Madhub v. Matungini*, 13 Cal. 104 (F.B.). But this ruling, although given by a Full Bench, ought not to be taken as authoritative, because at the time when it was pronounced a different practice prevailed in the Court as to the dating of decrees (see this case explained in 39 Cal. 766 at pp. 769-772); this case has therefore been distinguished in all the cases cited above. In *Ram Asray v. Sheo Nandan*, 1 P.L.J. 573, 35 I.C. 868 a Full Bench of the Patna High Court blindly followed the ruling of

13 Cal. 104; but this Patna case has been likewise distinguished in two subsequent cases of the same High Court, *Jyotindra Nath v. Lodna Colliery Co., Ltd.*, 6 P.L.J. 350 and *Syed Mahomed Moinuddin v. Mahomed Ishaq*, 75 I.C. 265, A.I.R. 1923 Pat 529.

Where the judgment was pronounced on the 18th December and the decree signed on the same day, but the bill of costs was not signed till the 18th January, and the appellant had applied for a copy on the 14th January which was furnished on the 24th January: *held* that the period which should be deducted under sec. 12 is the period from 14th January to 24th January, but not the period between the 18th December and the 18th January, during which the *bill of costs* remained unsigned. The decree in this case was signed on the 18th December, before the application for a copy was made; and it was only the *bill of costs* which remained unsigned at the time of application. The non-signature of the bill of costs had no effect at all upon the appellant—*Yamaji v. Antaji*, 23 Bom. 442.

128. Delay in preparation of decree :—Where some time is taken in getting the decree drafted because the extra Court-fee is not paid, and time is given for its payment, such time must be deducted, provided that an application for copy was made before the preparation of the decree—*Narayanaswamy v. Krishnaswamy*, 25 I.C. 67 (Mad.).

129. Closing of Court after delivery of Judgment :—Where the Court was closed for vacation on and from the day following that on which the judgment was pronounced, and the appellant applied for a copy of the judgment on the next re-opening day, *held* that in the circumstances of the case, the time during which the Court was closed should be excluded as it must be taken to be a part of the time requisite for obtaining a copy of the judgment—*Saminatha v. Venkatasubba*, 27 Mad. 21; *Sri Chandan v. Haroo Sheikh*, 13 C.L.J. 544, 11 I.C. 387; *Abdul Ghaffar v. Rasulunnissa*, 25 O.C. 71, 68 I.C. 250, A.I.R. 1922 Oudh 39. Judgment was pronounced on the 27th September, and the decree prepared and signed on the same date. The annual vacation began on the following day, and the Court re-opened on the 1st November. The appellant applied for copy of judgment on the 3rd November and for copy of decree on the 13th, and obtained both of them on the 21st and filed his appeal in the Lower Appellate Court on the 28th November. It was *held* that since the day on which the judgment was pronounced must be deducted under sub-section (2) and since the appellant could not have applied for copies during the vacation which immediately followed the date of judgment, the whole of the time from the delivery of judgment to the re-opening of the Court was part of the "time requisite for obtaining copies of judgment and decree;" and this must be so whether the appellant applied for copies on the very day on which the Court re-opened or on some later date. The date on which the application for copies was made has no bearing on the question whether or not the period of the vacation should be deducted—*Debi Charan v. Mehdi Hussain*, 1 P.L.J. 485 (490), 20 C.W.N. 1303, 35 I.C. 888.

following *Saminatha v. Venkatasubba*, 27 Mad. 21 (23); *Munshi Mahton v. Lachman*, 10 P.L.T. 545, A.I.R. 1929 Pat. 615 (616). In another case of the Madras High Court based on the same facts it has been held that, if the judgment was delivered on the last court-day before the vacation and the appellant applied for copy several days after the re-opening of the Court, the days during which the Court was closed could not be deducted—*Subramanyam v. Narasimham*, 43 Mad. 640 (642), 38 M.L.J. 465, 56 I.C. 67.

In the earlier Madras case, judgment was delivered on the 22nd December, the last Court day before the Christmas vacation. The Court re-opened on 7th January, and the appellant applied for copies of the judgment and decree on the very day. He presented his appeal on a day which would have been in time if he was entitled to deduct the period during which the Court had been closed. The other side contended that since no application for copy was made before the vacation, the period of vacation could not be deducted, and that the words "requisite for obtaining a copy of the judgment" presuppose an application for the copy. Held, overruling the contention, that there was nothing in the section to suggest that those words ought to be so construed. It is not impossible to conceive of cases where time may properly be deducted though the commencement of the period from which time is deducted precedes the actual application for a copy of the judgment. The appellant in the present case was entitled to deduct the period of vacation—*Saminatha v. Venkatasubba*, 27 Mad. 21 (23).

Even where a judgment is delivered on the day preceding the last working day before the Court's vacation for a month, and an application for a copy is made on the very day on which the Court re-opens after the vacation, the appellant is entitled to the indulgence of having his application for copy being accepted as equivalent to an application made a month earlier. He acts with due diligence and is entitled to have the time extended under the provisions of section 5. The principle is that it is unreasonable to cut down to 24 hours the time for a party to read and consider a judgment delivered against him, to come to a decision whether he would or would not appeal and file an application for copies of the judgment and decree. If the law is strictly applied, the appellant would have to make his decision all in one day. But it is unreasonable to expect him to get so much down in the time—*Sripat v. Hubdar*, 2 O.W.N. 678, A.I.R. 1925 Oudh 643, 90 I.C. 115.

130. Application for copy made after re-opening while right of appeal subsists.—Provided that copies of judgment and decree have not been obtained previously, if the period for the presentation of an appeal expires on a day on which the Court is closed, and if the appellant applies for copies of the decree and judgment on the date of the re-opening of the Court, whilst his right of appeal is still alive (by virtue of sec. 4) he is entitled to the benefit of this section, and if his appeal be presented on the day he gets the copies (or even on the next day) it is not barred by limitation—*Siyadat-un-nissa v.*

Muhammad, 19 All. 342 (347); *Pandharinath v. Sankar*, 25 Bom. 586 (588); *Tukaram v. Pandurang*, 25 Bom. 584 (585); *Sitaram v. Ramji*, 2 Bom. L.R. 221; *Attri v. Ramkishan*, 11 Lah. 111, A.I.R. 1930 Lah. 216, 120 I.C. 169; *Naman v. Gurditta*, 89 I.C. 437, A.I.R. 1926 Lah. 121; *Ma Dan v. Tan Chong*, 6 Rang. 743, A.I.R. 1929 Rang. 96; *Kashibai v. Kannoo*, 11 N.L.R. 104, 29 I.C. 833; *Megh Baran v. Rama Das*, 89 I.C. 956, A.I.R. 1926 All. 111. And the result is the same if the application is made *during the vacation*, after the period of limitation, while the right of appeal still subsists owing to the closing of the Court—*Ram Chand v. Ram Rattan*, 10 Lah. L.J. 257, A.I.R. 1928 Lah. 655 (656). In other words, copies can be applied for at any time when the right of appeal is still subsisting, even though the application is made after the expiry of the period of limitation—*Ram Chand v. Ram Rattan*, supra (dissenting from *Guran v. Bindrabai*, 79 P.R. 1916, 125 P.L.R. 1916, 35 I.C. 233).

But if the copies were obtained before the commencement of the vacation, and the time requisite for obtaining the copies and the period of limitation prescribed by the 1st schedule added together expired on a day on which the court was closed, section 4 would enable the appellant to present his appeal only on the day of the re-opening of the Court and not on a later date, and the appeal would not be in time unless presented on the date that the Court re-opened—*Siyadatunnissa v. Muhammad Mahmud*, 19 All. 342 (347).

The time requisite for obtaining a copy begins from the date on which an application for the copy has been made. So, if the right of appeal *did not subsist* on the date on which the application for copies was made, reference to sec. 12 is of no avail to the appellant, and no deduction of time would be allowed—*Nibaran Chandra v. Martin & Co.*, 32 C.L.J. 127, 58 I.C. 408 (409); *Venkata Row v. Venkatachella*, 28 Mad. 452 (453); *New Piecegoods Bazar Co v. Jivabhai*, 15 Bom. L.R. 681, 20 I.C. 537 (538); *Ashiq v. Ali Buksh*, 61 P.L.R. 1911, 9 I.C. 381; *Siyadatunnissa v. Md. Mahmud*, 19 All. 342 (346). An appellant who has not within the period of limitation applied for a copy of the order appealed from, and who has within that period taken no steps whatever towards procuring such copy, cannot be allowed, after the period of limitation has run out, to claim exclusion of time requisite for procuring such copy—*Pramatha v. Lee*, 23 C.W.N. 553, affirmed on appeal to the Privy Council in 49 Cal. 999, 27 C.W.N. 159, 68 I.C. 900, A.I.R. 1922 P.C. 352.

If the judgment was delivered nearly 3 months before the closing of the District Court for vacation and the application for copy was made on the re-opening day when the right of appeal did not subsist, the appellant was not entitled to a deduction of the holidays because he had sufficient time within which he could have made the application before the Court closed—*Venkata Row v. Venkata Chella*, 28 Mad. 452 (453); *Sundaram v. Andi*, 1911 M.W.N. 364, 11 I.C. 339.

131. Copy taken by another party :—This section does not require that the application for copy must be made by the party himself—*Rudra v. Raghuraj*, 23 I.C. 209. When it appeared that the appellant applied within the prescribed period for a copy of the decree appealed from but allowed the application to be dismissed for non-payment of the copying charges, and subsequently filed the appeal together with a copy of the decree which had been obtained by another party, it was held that the appellant was entitled to a deduction of the time taken in obtaining this latter copy. There are no grounds for importing into the section the restriction that the copy of the decree must have been obtained on the application of the appellant himself—*Aminuddin v. Pyari*, 43 Mad. 633, 38 M.L.J. 340, 56 I.C. 73 (dissenting from *Ramamurthi v. Subramania*, 12 M.L.J. 385). The language of section 12 is very general. It does not say by whom the copy is to be obtained. The time requisite for obtaining copies of decree and judgment should be excluded from computation of the period of limitation, and it is not necessary that the application for the copies should be made by the appellant or some duly authorised agent, nor is it necessary to show for what purpose the copies were obtained—*Ram Kishan v. Kashi Bai*, 29 All. 264. In this case the copy had been applied for by the clerk of the appellant's Vakil, in his own name.

132. Criminal Appeal :—In computing the period of limitation prescribed for a criminal appeal, the time taken in forwarding an application by the prisoner for a copy of the judgment and in transmitting the same from the Court to the jail must be excluded along with the time taken in the actual preparation of the copies in the office of the Court—*Empress v. Lingaya*, 9 Mad. 258 (259). See also *Gallagher v. Emp.*, 54 Cal. 52, 101 I.C. 657, A.I.R. 1927 Cal. 307.

But the time spent in obtaining a copy of the diary orders in the case, which were filed with the appeal, should not be excluded. There is no provision of law in the Cr. P. Code nor any rule of the Court requiring to deduct this period—*U. Zagriya v. Emp.*, 3 Rang. 220, 4 Bur. L.J. 44, 89 I.C. 459, A.I.R. 1925 Rang. 239.

132A. Miscellaneous appeal .—Where a formal decree has been drawn up in a miscellaneous case under sec. 47 C. P. Code, the time requisite for obtaining a copy of such a decree, which embodies the complete adjudication in the case, is to be deducted under sec. 12, Limitation Act—*Mahesh Kanta v. Chowdhury Ram Prasad*, 1 P.L.T. 33, 54 I.C. 630.

The plaintiff after having obtained a decree, applied under sec. 476 Cr. P. Code to prosecute the defendant for having made certain false statements in his written statement. The Munsif rejected the application on 21st May 1924, and an appeal was filed in the Sessions Court under sec. 476B after more than 30 days allowed by Art. 154 of the Limitation Act. But the application of the plaintiff was treated as a separate miscellaneous civil case and a copy of the formal order was drawn up embodying the result of the judgment passed in the case, and the plaintiff

had applied and obtained a copy of the formal order, according to the rules of the Court, before appealing to the sessions Court. *Held* that the time taken for obtaining the copy of the formal order should be deducted under sec. 12 of the Limitation Act, and the appeal was within time—*Daulat v. Kanhaiya*, 47 All. 462, 23 A.L.J. 297, A.I.R. 1925 All. 419, 87 I.C. 417.

133. Application for leave to appeal to Privy Council :—Section 12 of the Act of 1877 was restricted to an application for leave to appeal as a pauper and did not apply to an application for leave to appeal to His Majesty in Council; see *Anderson v. Periasami*, 15 Mad. 169; *Moroba v. Ghanasham*, 19 Bom. 301; *Shib Singh v. Gandharb Singh*, 28 All. 391. But the general language of section 12 of the present Act *does* cover such an application, and the time requisite for obtaining a copy of the decree of the High Court will be excluded from computation under sub-section (2)—*Ram Sarup v. Jaswant*, 38 All. 82, 13 A.L.J. 1114, 31 I.C. 906; *Abdulla v. Administrator General*, 42 Cal. 35, 18 C.W.N. 1066; *Eastern Mortgage and Agency Co. v. Purna*, 39 Cal. 510, 15 I.C. 497; *Gulabchandji v. Gulab Singh*, 24 N.L.R. 97 A.I.R. 1928 Nag. 63

The time spent in obtaining a copy of the judgment also will be excluded under sub-section (3), because it is generally necessary that the judgment on which the decree of the High Court is based should be obtained in order that the parties may satisfy themselves by references to it exactly what its terms are, and further because the rules of the High Court require a copy of the judgment to be filed with the application for leave to appeal to the Privy Council—*Mahabir Prasad v. Jamuna Singh*, 1 Pat. 429 (431), 3 P.L.T. 289, A.I.R. 1922 Pat. 255, 68 I.C. 88. Although sub-section (3) does not in terms apply to an application for leave to appeal, still the words “when a decree is appealed from” may be interpreted to mean “when a decree is sought to be appealed from,” and then the words would apply to an application for leave to appeal to the Privy Council; the time requisite for obtaining a copy of the judgment may therefore be excluded—*In re Collector of Chingleput*, 48 Mad. 939, 49 M.L.J. 418, 90 I.C. 601, A.I.R. 1925 Mad. 1241. But the Allahabad High Court and the Sind Court have laid down that since sub-section (3) does not expressly speak of an application for leave to appeal but only of appeal and review of judgment, the time spent in obtaining a copy of the judgment cannot be deducted in an application for leave to appeal to the Privy Council—*Wilayat v. Jhandu Mal*, 24 A.L.J. 349, 92 I.C. 897, A.I.R. 1926 All. 286; *Nur Mahomed v. Hassomal*, A.I.R. 1925 Sind 60, 78 I.C. 953. Moreover the rules of these Courts do not require a copy of the judgment in such a case.

134. Time spent in taking unnecessary copies :—In computing the period of limitation prescribed for an appeal under clause 10 of the *Letters Patent* from the decision of a single Judge, the time requisite for obtaining a copy of the judgment appealed from cannot be deducted, such copy not being required under the *Letters Patent* to be

presented with the memorandum of appeal—*Fazl Muhammad v. Phul Kuar*, 2 All. 192; *Deokital v. Ramanand*, 5 P.L.J. 701, 59 I.C. 179. But in cases of appeals falling under sec. 12 of the Limitation Act the positive direction of this section must not be ignored. And so, even though the practice or the rules of the Court do not require that a copy of the judgment or of the decree should be filed with the memorandum of appeal, still the appellant is entitled to deduct the period required for obtaining the copy. It is not within the power of the Court to nullify the effect of sec. 12—*Haji Hassum v. Nur Mahomed*, 28 Bom. 643 (644); *Gangadhar v. Shekhar Basini*, 20 C.W.N. 967, 35 I.C. 348; *Kirpa Ram v. Rakhi*, 114 P.R. 1907. The Rangoon High Court was of opinion that where under the Rules of the Court, it was not necessary to file a copy of the decree along with the memorandum of appeal, the time spent in obtaining a copy of the decree would not be excluded. The words "time requisite for obtaining a copy of the decree" implied that it was essentially necessary to obtain copies and that some time must necessarily be spent in obtaining such copies; but when no copies at all were needed for the purpose of filing appeals in accordance with law, no time was requisite i.e., was indispensibly necessary for obtaining the copies—*J. N. Surti v. Chettiar Firm*, 4 Rang. 265, A.I.R. 1927 Rang. 20, 98 I.C. 417. But this decision has been reversed by the Privy Council who have laid down that in reckoning the time for presenting an appeal, the time required for obtaining a copy of the decree and judgment must be excluded, even though by the rules of the Court it is not necessary to obtain such copies. The rules of the High Court eliminating the requirement to obtain copies of the documents were no doubt framed to combat the dilatoriness of Indian practitioners, but there are plain words in sec. 12 enacting it as a positive direction that the time requisite for obtaining the two documents is to be excluded from computation—*Jyibhoy N Surti v. T S Chettiar Firm*, 6 Rang 302 (P.C.), A.I.R. 1928 P.C. 103, 32 C.W.N. 845 (847), 26 A.L.J. 657, 30 Bom. L.R. 842, 54 M.L.J. 696, 109 I.C. 1.

In a second appeal, the time requisite for obtaining a copy of the decree of the Court of first instance cannot be deducted, such copy not being required to be filed along with the memorandum of second appeal—*Pirathi v. Venkataramanayyan*, 4 Mad 419. So also, the time occupied in obtaining a copy of the judgment of the Court of first instance will not be deducted in computing the period of limitation for a second appeal, because it is not a judgment on which the appellate decree is founded within the meaning of sub-section (3), and a copy of it is unnecessary, even though the High Court makes a rule under which the memorandum of second appeal is required to be accompanied by a copy of the judgment of the Court of first instance, such a rule cannot have the effect of altering the period of limitation prescribed by this Act. Therefore in spite of the existence of such a rule the appellant before the High Court will not be entitled to deduct the period requisite for obtaining a copy of the first Court's judgment—*Narsingh Sahai v. Shro Prasad*, 40 All. 1 (F.B.); *Chunilal v. Dabhyabhai*, 32 Bom. 14; *Mudra Gopal v.*

Malawa Ram, 68 I.C. 777 (Lah.); *Babu Singh v. Mangal Rai*, 9 Lah. L.J. 5, A.I.R. 1927 Lah. 192, 100 I.C. 154; *Chuharmal v. Bira Ram*, A.I.R. 1923 Lah. 461, 73 I.C. 919; *Jagiri v. Daulat*, A.I.R. 1928 Lah. 755 (756), 112 I.C. 46. This is also the view of the Rangoon High Court, but that High Court is also of opinion that in certain exceptional cases the Court may in its discretion excuse the delay caused in obtaining the judgment of the Court of first instance—*Maung Po Aung v. U Bya*, 3 Rang. 310, 90 I.C. 910, A.I.R. 1925 Rang. 344. The Lahore High Court also holds in a recent case that although an appellant preferring a second appeal is not entitled as of right to deduct the period spent in obtaining a copy of the first Court's judgment, still where the appellant had applied for such copy before the limitation for filing the second appeal had expired, the High Court may allow the deduction of the time spent in obtaining that copy—*George Gowshala v. Balak Ram*, 103 I.C. 498, A.I.R. 1927 Lah. 717.

135. Application for review—Although it is not necessary that an application for review of judgment should be accompanied by of copy of the decree, order or judgment sought to be reviewed, still time is allowed for obtaining such copy in order that the person interested in applying for review of judgment might inform himself accurately by a perusal of the copy of the decree or order or judgment as to what its contents are, so that he may not be compelled, for fear of limitation, to hurry into an application for review without having the full opportunity of considering the terms of the decree, order or judgment—*Wajid Ali v. Nawal*, 17 All. 213 (216) (F.B.); *Gangadhar v. Sekharbasini*, 20 C.W.N. 967, 35 I.C. 348; *Chokkalingam v. Lakshmanan*, 38 M.L.J. 224, 55 I.C. 444.

135A. Application to set aside award :—In respect of an application to set aside an award, the time taken for obtaining a copy of the award must be excluded from computation—*Sova Chand v. Hurry Bux*, 46 Cal 721 (727); *Ghulam Khan v. Mahammad Hasan*, 29 Cal. 167 (183) P.C.; *Wazid Ali v. Nawal Kishore*, 17 All. 213 (215).

136. Appeal under special or local laws :—Under subsection (2) (a) of section 29 as amended in 1922, the provisions of this section shall apply for the purpose of determining any period of limitation prescribed by any special or local law. The following decisions are therefore no longer good law :—*Wall v. Howard*, 18 All. 215; *Kumara v. Sithala*, 20 Mad. 476; *Daulat Ram v. Woollen Mills Co.*, 95 P.R. 1908; *Bhagwan v. Collector*, 133 P.L.R. 1904, 79 P.R. 1904; *Abu Backer v. Secretary of State*, 34 Mad. 505 (F.B.); *Jugal Kishore v. Gur Narain*, 33 All 738; *Duraisami v. Meenakshi*, 1914 M.W.N. 831, 25 I.C. 610; *Sivaramayya v. Bhujanga*, 39 Mad. 593; *Lingayya v. Chinna Narayana*, 41 Mad. 169 (F.B.). The ruling in *Dropodi v. Hira*, 34 All. 496 (F.B.) will now stand as correct. This section has been made applicable to all appeals and applications under the Provincial Insolvency Act (V of 1920), by sec. 78 of that Act.

Under the present amendment, this section will apply to an applica-

the Collector to make a reference to the District Court under the Land Acquisition Act, and the appellant will be allowed the period requisite for obtaining a copy of the Collector's *Surjee v. Special Collector, Rangoon*, 5 Bur. L.J. 26, A.I.R. g. 135, 96 I.C. 110. But the Lahore High Court dissents from and observes that sec. 12 does not apply to such reference—*v. Secy. of State*, 9 Lah. 244, A.I.R. 1927 Lah. 858 (859) *Bhagwan v. Collector*, 79 P.R. 1904 (supra). It has to be at the Judge did not take note of the amendment of sec. 29, followed the old Chief Court ruling

Interference by High Court :—What time is or is not or obtaining a copy of the judgment etc is a question of fact rmined by the Appeal Court, and whether that fact be decided wrongly, the decision cannot be interfered with in second *ana Mal v Nihali*, 6 P.R. 1894, *Ram Sarup v. Zorawar*, 73 A.I.R. 1923 Lah. 696; *Sher Singh v. Prem Raj*, 100 P.R. C. 31.

In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India and from the territories beyond British India the administration of the Government shall be

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This section is based on the English law, according to which, if the defendant is beyond seas at the time of the right of action accruing to the plaintiff, the time or times appointed by the statute do not begin to run until the defendant returns from beyond seas See Banning on Limitation, 3rd Edn., p 65.

138. Scope :—This section applies only to defendants in favour of plaintiffs so as to prevent limitation from running against the latter, and only in respect of the institution of a suit; it is not applicable in favour of a defendant who has been absent from British India and wants to set aside proceedings in execution—*Akshat v. Ganga*, 3 All 185. a

This section has reference only to the absence of the defendant from the realm, not to that of the plaintiff. A plaintiff out of the realm may prosecute a suit by his attorney, but when the defendant is out of the realm it is very hard to call upon the plaintiff to institute a suit which in most cases must be wholly without fruit—*Dorman v. Shubal Koolall*, 10 W.R. 253.

The plaintiff's voluntary absence in a foreign country cannot bar the operation of limitation—*Venkatasubba v. Ginnarimal*, 2 M.H.C.R. 113. And this section is equally inapplicable even if the plaintiff's absence may be involuntary through transportation—*Dorman v. Shubal*, 10 W.R. 253. In England also, the disability of the plaintiff arising from absence

beyond seas and the disability of imprisonment have been abolished by the Mercantile Law Amendment Act 1856 (19 & 20 Vic. C. 97),

139. Absent :—The word 'absent' includes a person who has never been present in British India. Absence does not necessarily require a previous presence—*Maharaja v. Provincial Bank*, 72 P.R. 189; *Krishto v. Lyon*, 14 Cal. 457; *Poorna v. Sassoon*, 25 Cal. 496, where the defendant pays occasional visits to British India, this will apply—*Janki v. Manohar Lal*, 26 P.R. 1897.

If the defendant actually returns to British India, the plaintiff's ignorance of the fact of such return does not prevent the operation of the limitation—*Mahomed Museehooddeen v. Clarajene*, 2 N.W.P. 1.

Strict proof of absence is necessary. Where a plaintiff says the defendant was out of British India for a certain period, and the plaintiff is entitled to deduct this period, all this should be specifically pleaded. The plaintiff would be required strictly to prove the duration of the defendant's absence—*Periyanna v. Arasu*, 9 M.L.T. 217, 568.

140. Defendant represented by agent .—It was held in *Harrington v. Ganesh Roy*, 10 Cal. 440, that this section did not apply when the defendant, though not residing in British India, was known to the plaintiff represented by a duly constituted agent, a mookhtar. But that decision was doubted in *Atul Krishto v. L.*, 10 Cal. 457 and afterwards overruled by the Full Bench in *Poorna v. Sassoon*, 25 Cal. 496, in which it has been held that this section applies even where to the knowledge of the plaintiffs, the defendant (partners in a firm) are during the period of their absence carrying on business in British India through an agent, who is empowered to sue and defend suits.

Ruling Chief :—This section does not apply to a suit against a Ruling Chief (e.g. Gaikwar of Baroda), because he is always represented by agents and representatives who manage his business in British India, and he cannot therefore be said to be absent from British India, although personally he is and necessarily must be always out of British India. This position is analogous to the Secretary of State for India. More recently, in a suit against a Ruling Chief is not brought personally against him but against his State (sec. 87 C. P. Code)—*Sayaji Rao, Gaikwar v. Madhavji*, 53 Bom. 12, A.I.R. 1929 Bom. 14 (20), 30 Bom. L.R. 1463, 115 I.L.R. 1463.

141. Several defendants—Absence of one :—Under the English law, where there are several defendants and one of them is beyond seas at the time of the right of action accruing to the plaintiff, the time does not begin to run against the absent defendant until he returns, but as against the defendants who are not beyond seas at the time of the right of action accruing to the plaintiff, the time begins to run equally as if they were the persons solely liable to be sued. See *Banning on Limitation*, 3rd Edition, p. 66. In a suit also, in a suit against partners, where one of the partners is absent

India, it has been held that the fact of his absence does not entitle the plaintiff to deduct the time against *all* the defendants, but against the particular absentee defendant only; but the fact that he has allowed the suit to be barred against the other partners who are present in India during the absence of the absentee is not a ground for holding that the claim against the absentee is also barred by limitation—*Palaniappa v. Veerappa*, 41 Mad. 446, 34 M.L.J. 41, 44 I.C. 466.

142. Absence after accrual of cause of action :—It was held in *Narronji v. Mugniram*, 6 Bom. 103, that this section must be read subject to section 9, that the absence of the defendant from British India was to be regarded as the plaintiff's 'inability to sue' within the meaning of sec. 9, and therefore if the defendant's absence took place after the accrual of the cause of action the period of limitation would not be suspended during such absence but would run continuously according to the provisions of that section. But it has been pointed out in subsequent cases that the 'inability' referred to in sec. 9 must be a personal inability affecting the *plaintiff* himself and having reference to *his* condition, state or position, and not to the circumstances of the *defendant*; consequently the absence of the defendant is not an 'inability' within the meaning of sec. 9, and therefore that section would not apply to the case, but the period of limitation would be suspended during the defendant's absence. Section 9 should not control sec. 13, and the period of defendant's absence would be deducted from computation, no matter whether such absence took place before or after the accrual of the cause of action—*Hanmantram v. Bowles*, 8 Bom. 561; *Beake v. Davis*, 4 All. 530, *Janki v. Manoharlal*, 26 P R 1897. In all these cases the Judges have dissented from 6 Bom. 103. In another Bombay case also it has been held that the absence of the defendant from British India does not amount to an 'inability to sue' within the meaning of sec. 9—*Jivraj v. Babaji*, 29 Bom 68 (70).

143. 'Territory under administration of Government':—A place outside British India (e.g. Basra) which is merely in military occupation by an army despatched by the Government of India is not a territory under the administration of the Government of India within the meaning of this section, but is a foreign territory under military occupation, the object of which is much more restricted than that of an administration. Therefore the period during which the defendant was staying in Basra should be excluded under this section, as the defendant was 'absent from British India and from the territories beyond British India under the administration of the Government'—*Fakhrullah v. Ramisarrup*, 45 All. 18, 20 A.L.J. 786, 68 I.C. 978, A.I.R. 1923 All 64.

14. (1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a

Exclusion of time of proceeding bona fide in Court without jurisdiction.

Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Explanation I.—In excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation II.—For the purposes of this section, a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.

Explanation III.—For the purposes of this section, misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

144. Scope:—This section is not applicable for the purpose of computation of time for appeals—*Ardha Chandra v. Matangini*, 23 Cal. 325 (327); *Beni Singh v. Berhamdeo*, 19 C.W.N. 473 (474). But its reasonable principle may be applied, and the circumstances contemplated in this section may and ordinarily would constitute a sufficient cause within the meaning of section 5 for not presenting an appeal in time—*Balwant v. Gumani*, 5 All. 591; *Ramjiwan v. Chandmal*, 10 All. 587 (596); *Karim Baksh v. Daulat Ram*, 183 P.R. 188; *Kamiruddin v. Bisnu-priya*, 33 C.W.N. 76 (77); *Kumudini v. Kamalakant*, A.I.R. 1922 Cal. 247, 35 C.L.J. 106. The Privy Council have observed that although sec. 14 does not apply to appeals, it is relevant for the purpose of considering a case under sec. 5—*Brij Indar v. Kanshi Ram*, 45 Cal. 04 (103) (P.C.). Thus, the *bona fide* prosecution of a proceeding in a wrong Court has been regarded as a proper ground or a 'sufficient cause' within the

meaning of section 5 for extending the time for filing the appeal—*Rupa Thakurani v. Kurnudnath*, 22 C.W.N. 594. Where the appellant through bona fide mistake preferred his appeal in a wrong Court, but lost no time in re-filing it in the proper Court after it was returned to him, held that it would not be improper to apply the provisions of sec. 14, and the appeal should be heard—*Kishan Lal v. Tika*, 49 All. 555, A.I.R. 1927 All. 719, 101 I.C. 750. So also, on the analogy of section 14, the time spent in a suit wrongly filed for getting an order set aside might properly be deducted in computing the period of limitation for subsequently filing an appeal from such order—*Sitaram v. Nimba*, 12 Bom. 320. See Notes 50 and 51 under sec. 5.

In two recent Allahabad cases (*Gadre v. Brijnandan*, 21 A.I.J. 205, 45 All. 332 and *Ram Raj v. Umraji*, 93 I.C. 292, A.I.R. 1920 All. 345) it has been held (without any reason being assigned for it) that this section does not apply to applications. This decision is incorrect, as sub-section (2) does apply to applications.

145. Same plaintiff in both suits :—A plaintiff can claim the benefit of this section only where the previous proceeding had been brought by himself or by some person through whom he derives title to sue—*Barodakant v. Sookmoy*, 1 W.R. 29. If the former proceeding had been instituted by a wrong plaintiff, no deduction can be made. Thus, where the manager of the plaintiff brought a suit in his own name for the value of trees cut down by the defendant on the plaintiff's ground and the suit was dismissed as he had no cause of action, the plaintiff himself in bringing a subsequent suit could not deduct the time occupied in the previous suit—*Rajendra v. Bulaky*, 7 Cal. 367. Where the plaintiff and another person had brought the previous suit in one capacity, and the plaintiff alone brought the present suit in another capacity, no deduction of time spent in the previous suit can be made—*Hossein v. Asha Bibi*, 1 Rang. 402, A.I.R. 1924 Rang. 123, 76 I.C. 639 (see this case fully cited in Note 150 below). Where the plaintiff in the second suit was not prosecuting the first suit and was not associated with the plaintiffs of the first suit, no deduction of time can be made—*Niranka v. Atul Krishna*, 28 C.W.N. 1009, A.I.R. 1925 Cal. 67, 83 I.C. 110. Where the previous suit was originally filed by A and B, who were two of the partners of a firm, and C the third partner being unwilling to join as a plaintiff was impleaded as a formal defendant, and the second suit was filed by C alone and the other two partners withdrew from the suit, held that the two suits were not brought by the same parties, and this section did not apply—*Nadesan v. Sankaran*, 5 Rang. 600, A.I.R. 1928 Rang. 21, 105 I.C. 701. Four members of a firm brought four separate suits for a debt due to the firm, each claiming a one-fourth share of the debt; the suits having been dismissed, the firm brought the present suit on the consolidated debt. Held that the plaintiff in the present suit and the plaintiffs in the previous suits were not the same, and this section could not apply—*Firm Ram Lochan v. Jagat Narain*, A.I.R. 1927 All. 181, 98 I.C. 1050.

146. 'Prosecuting a proceeding' :—It is not necessary that the plaintiff must have been prosecuting the previous proceeding as a plaintiff. He is entitled to a deduction of the period of pendency of a former suit in which he as defendant was urging the same claim as he afterwards prefers as plaintiff—*Jugutendra v. Din Dayal*, 1 W.R. 310. Similarly, the plaintiff is entitled to deduct the period during which he as respondent has been opposing a previous appeal brought against him by the present defendant—*Lakhan Chander v. Madhusudan*, 35 Cal. 209. (See Explanation 2). So also, a plaintiff who in a previous insolvency proceeding had been filing a proof of his debt before the official assignee will be said to have been prosecuting a proceeding, and the time spent in such proceeding will be excluded—*N. K. M. Chetty v. Lutchman Chetty*, 52 I.C. 934 (935), 12 Bur. L.T. 83. The decree-holder making an application for execution is entitled to deduct the time occupied by him in resisting a previous suit brought by the judgment-debtor for stay of execution of the decree—*Navalchand v. Anichand*, 18 Bom. 734. But in a recent Bombay case it has been held that merely defending a suit does not amount to prosecuting a proceeding. Explanation 2 speaks of resisting an appeal and does not speak of resisting a suit—*Som Sekhar v. Shivappa*, 25 Bom L.R. 863, 76 I.C. 557, A.I.R. 1924 Bom. 39. The Lahore High Court has held, on an application to file an award beyond the period of limitation prescribed by Article 178, that under the circumstances of the case the applicant would not be entitled to deduct the time spent by him as defendant in setting up the award in bar of a prior suit instituted by the plaintiff—*Nazim Khan v. Alam Khan*, 89 P.R. 1919, 52 I.C. 561.

147. Another civil proceeding :—It includes a proceeding by way of appeal or revision. Thus, in a suit to set aside an order, the plaintiff is entitled to a deduction of the time during which he had been prosecuting an appeal or revision against the order—*Seth Mulchand v. Seth Samir*, 1882 A.W.N. 59. A revision to the High Court is a "civil proceeding in a Court of appeal" within the meaning of this section—*Venkatarangayya v. Murala*, 17 I.C. 539. The period spent in prosecuting a suit in a wrong Court and an appeal from the decision therein shall be excluded in computing the period of limitation for a subsequent suit brought in the proper Court—*Hari Prasad v. Sourendra Mohan*, 1 Pat. 506; *Raj Krishto v. Beer Chunder*, 6 W.R. 308.

In order to decide whether a proceeding should properly be termed a civil proceeding in a Court, it is necessary in each case to examine the precise nature of the proceeding and the constitution of the authority before whom such proceeding is taken—*Laxman v. Keshav*, 43 Bom 201, 20 Bom. L.R. 918, 48 I.C. 467.

An Insolvency proceeding before an Official Assignee is a civil proceeding. The word 'civil proceeding' is used in this section as opposed to a criminal proceeding—*N. K. M. Chetty v. Lutchman*, 12 Bur.L.T. 83, 52 I.C. 934 (935).

A proceeding before an arbitrator is a civil proceeding, and in com-

puting the period of limitation, an arbitrator should exclude the time spent in prosecuting in good faith the same claim before another arbitrator who was without jurisdiction—*Ram Dutt Ram Kissen v. E. D. Sassoon and Co.*, 56 Cal. 1048 (P.C.), 33 C.W.N. 495 (492), 49 C.L.J. 462, 115 I.C. 713, A.I.R. 1929 P.C. 103.

A proceeding before a settlement officer for mutation of names in the revenue records is not a civil proceeding in a Court within the meaning of this section. Even if the proceeding be considered to be a civil proceeding, still as it was not before a Court but before a purely executive officer, it did not fall under this section—*Muharimad Subbanullah v. Secretary of State*, 26 All. 382. A civil proceeding before a Revenue Court (as distinguished from a Revenue officer) falls under this section. Thus, where a suit was brought in the Revenue Court for arrears of rent but it was dismissed as the case did not fall under the Bengal Act VIII of 1869, held that in a subsequent suit in the civil Court on the same cause of action the plaintiff was entitled to deduct the time occupied by the suit in the Revenue Court—*Govindo v. Manson*, 15 B.L.R. 56. (Contra—A proceeding in a Revenue Court is not a civil proceeding—*Govinda v. Santa*, 83 P.R. 1914, 26 I.C. 441) So also, where the plaintiff tried to get an invalid certificate granted under section 8 of the Bengal Act VII of 1880 set aside by the Revenue Court, which however had no jurisdiction to grant him relief, it was held that the time spent in the Revenue Court should be deducted in computing the time for a subsequent suit—*Girijanath v. Ram Narain*, 20 Cal. 264, following *Ram Logan v. Bhawani*, 14 Cal. 9. An application under sec. 28, 29 or 42 of the Bengal Land Registration Act is not a civil proceeding, and the Land Registration Collector is not a Court—*Ramjee v. Rai Bishen Dutt*, 7 P.L.T. 61, 90 I.C. 244, A.I.R. 1926 Pat. 194.

An application to a Collector to take action under Sec. 11A of the Bombay Hereditary Offices Act, is not a civil proceeding in a Court, and the time taken up in such proceeding cannot be excluded under this section—*Laxman Ganesh v. Keshav Govind*, 43 Bom. 201, 20 Bom. L.R. 918, 48 I.C. 467.

Proceeding before Conciliator:—The money due on a bond became payable on 31st May 1910; the plaintiff applied to the Conciliator for a certificate on the 28th March 1913, but before he could obtain it, Government abolished the conciliation system with effect from 30th May 1913. The plaintiff filed the suit on the 30th June 1913, and claimed to exclude the time between 28th March and 30th May 1913, from the period of limitation. It was held that though the plaintiff was not entitled to deduct the time claimed, he was entitled to a reasonable extension of time, on the principle that where the law creates a limitation and the party is disabled to conform to that limitation without any default on his part, and he has no remedy over, the law will ordinarily excuse him—*Satyabhamabai v. Govind*, 38 Bom. 653, 16 Bom. L.R. 447, 25 I.C. 66. But where the conciliation system was abolished after the plaintiff obtained the certificate and before the institution of the suit, the plaintiff was entitled

to deduct the period between his application to the conciliator and the grant of the certificate—*Rupchand v. Mukunda*, 38 Bom. 656, 25 I.C. 67.

148. Court :—The 'Court' only refers to a Court in British India, and does not include a Foreign Court, such as a Court in a Native State. The time spent in proceedings before such a Court cannot be deducted—*Chanmalappa v. Abdul Wahab*, 35 Bom. 139, 12 Bom L.R. 977, 8 I.C. 645; *Parry v. Appasami*, 2 Mad. 407; *Rajanna v. Narayan*, A.I.R. 1923 Nag 321; *Harī Singh v. Muhammad Said*, 8 Lah 54, 102 I.C. 523, A I.R. 1927 Lah. 200.

An arbitrator whom the parties have substituted for the Court of law to be the judge of the dispute between them is a Court, and the time spent in prosecuting in good faith the same claim before an arbitrator can be deducted—*Ramdutt Ramkissen v. E. D. Sassoon & Co.*, cited in Note 147 ante; *Abdul Rahim v. Ojamshee*, 56 Cal 639, A.I.R. 1930 Cal. 5 (8)

A proceeding before an Official Assignee is a proceeding in an Insolvency Court—*N. K. M. Chetty v. Lutchman*, 12 Bur L.T 83, 52 I.C. 934 (935).

The settlement officer, the Commissioner and the Board of Revenue are not Courts but executive officers of Government—*Muhammad Subhanullah v. Secretary of State*, 26 All 382.

Under the rules framed by the Bombay High Court, the Collector is not a Court for the purpose of setting aside a sale under section 311 C P. Code (1882), and the period during which proceedings were pending before him cannot be deducted—*Narayan v. Rasulkhan*, 23 Bom. 531, *Tipan-gavda v. Ramangavda*, 44 Bom 50 (54), 22 Bom L.R. 35, 54 I.C. 670

A Conciliator acting under sections 10, 11, 11B of the Deccan Agriculturists' Relief Act is acting purely as an administrative officer and not as a Court—*Laxman Ganesh v. Keshav Govind*, 43 Bom. 201 (205). A Collector appointed under the Deccan Agriculturists' Relief Act, XVII of 1879, is not a Court. The time occupied by proceedings before him cannot be excluded in computing the time for proceedings in the regular Court—*Manohar v. Gebiapa*, 6 Bom. 31. The time occupied in proceedings before a Revenue officer (and not before a Revenue court) cannot be deducted under this section—*Abbas Ali v. Yusuf Ali*, 28 P.L.R. 158, 101 I.C. 254, A I.R. 1927 Lah. 186 (overruling 26 P.L.R. 27). But see 83 P.R. 1914, 26 I.C. 441.

In C. P., the Deputy Commissioner is not invested with power to dispose of objections under O. 21, r. 58, C. P. Code or to dispose of applications under O. 21, r. 100. He is not a Court in connection with those objections and applications, and the time spent in proceedings taken before him cannot be deducted—*Bandappa v. Shankar*, A.I.R. 1924 Nag. 309, 78 I.C. 580.

149. "Against the defendant" :—The defendant must be the same in both the proceedings. This section excludes the time taken in proceeding *bona fide* in a Court without jurisdiction against the particular

cause of action which is the foundation of the subsequent suit—*Duna v. Deo Nandan*, 17 C.L.J. 596, 20 I.C. 513. Where the first suit and the second were not substantially based on the same cause of action, this section would not apply—*Manghu v. Kandhai*, 8 All. 475. Thus, where a suit was originally brought by the landlord in the Revenue Court to eject the defendants as tenants, a subsequent suit by him in the Civil Court treating the defendants as trespassers would not be saved from limitation by the operation of this section, because the cause of action in both the suits is not the same—*Dondoo v. Sheo Narain*, 36 I.C. 770 (Oudh). Where the cause of action of the first suit was an alleged loan, and the cause of action in the second suit was a claim on a promissory note, held that the causes of action in the two suits were different, and thus section did not apply—*Nagesan v. Sankaran*, 5 Rang. 600, 105 I.C. 701, A.I.R. 1928 Rang. 21. Where a suit is dismissed for want of prosecution under O. 9, r. 2, the period covered by restoration proceedings cannot be excluded in computing limitation for a fresh suit brought under O. 9, r. 4, because the cause of action in the restoration proceedings is not the same as that in the subsequent suit, nor can it be said that the restoration proceeding failed for want of jurisdiction—*Chintaman v. Kisan*, 25 N.L.R. 99, A.I.R. 1929 Nag. 219, 116 I.C. 509. A partnership existed between H., M. and B. After the death of B in 1913, his wife A and his son C sued in 1914 as administratrix and administrator, for dissolution of partnership and for accounts. The allegations of the two plaintiffs were that the partnership had not been determined by the death of B as the two other partners took C into the partnership in his father's place. The Court held in 1917 that the partnership had terminated on the death of B, and directed that accounts should be taken; the claim to an account for a longer period was therefore dismissed. Meanwhile C had died in 1916. Then A brought the present suit as administratrix to the estate of her son and asked for a declaration that C was entitled to the same share in the business as his father had, from the date of his father's death in 1913 up to 29 March 1916 when C died. This suit was instituted in December 1919, but the plaintiff claimed that she was entitled to a deduction of the time during which the previous suit was pending, because limitation was suspended while that litigation was taking place. Held that the present suit was barred, and that plaintiff was not entitled to a deduction of the period, because the prior suit was in a different capacity and on a different cause of action. The parties to the first suit were not the same parties as those in the second suit; the cause of action in the first case was the claim to one estate, and the cause of action in the second case was the claim to another estate, and the proceedings in the first suit were not infructuous on the ground of defect of jurisdiction or any other cause of like nature—*Hossein v. Asha Bibi*, 1 Rang. 402, 76 I.C. 639, A.I.R. 1924 Rang. 123. The defendant was a shareholder of a company. His shares were forfeited and afterwards the company was wound up. On 10th October 1924 the liquidator filed his list of contributories, in which he put the name of the defendant, but the Court held on 13th October 1925 that the defendant's name had been wrongly

A plaintiff who wrongly sues a tenant in *ejectment* and loses his case cannot have the benefit of the time spent in that suit when he afterwards sues for *rent* which accrued due while the first suit was pending—*Hurro Pershad v. Gopal Chunder*, 9 Cal. 255 (P.C.). So also, a proceeding under sec. 46 of the Bengal Tenancy Act for assessment of fair and equitable rent is not a suit based on the same cause of action as a suit for recovery of rent at the old rate from the ralyat—*Port Canning Co. v. Achhiruddi*, 43 C.L.J. 45, 92 I.C. 37, A.I.R. 1926 Cal. 693. But where the plaintiff sued for land and mesne profits, and the claim for mesne profits was dismissed on the ground that a separate suit should be brought on it, *held*, in a second suit brought for the mesne profits, that the plaintiff would get a deduction of the time occupied in the first suit, as the cause of action in the two suits was the same—*Hurro Chander v. Shoorodhonee*, 9 W.R. 402 (F B). A plaintiff cannot be said to sue on the same cause of action when he brings a suit for possession of a land first under a proprietary right and failing on that, under a mere leasehold right—*Parakut v. Edapally*, 2 M H C R 266. Where the obligation sued upon previously was a several one and in the second suit it is joint, the two suits cannot be said to be based upon the same cause of action—*Morris v. Chinnasawmy*, 7 M H.C.R. 242.

The plaintiff had originally applied to the Court to enforce an award. The Court holding that the award was too inadequate to be capable of execution remitted the award to the arbitrators for reconsideration and they amended it accordingly; subsequently the plaintiff brought a regular suit on the amended award. The District Judge rejected the suit as barred by limitation. *Held* that the plaintiff was entitled to a deduction of time under sec. 14. The cause of action must be held to be the same in the previous and subsequent suits, as in both cases the ground on which the plaintiff came into Court was the alleged settlement of the disputes between him and the defendants by an award made by the arbitrators who were the same in both cases, and the substantive award was the same in both—*Nadar Mal v. Shankar Das*, 67 P.R. 1889. Where a decree-holder who had attached in 1913 a book-debt due in 1911 to his judgment debtor, sold it in auction and purchased it himself in February 1915, and sued in March 1915 to recover it from the defendant who.

pleaded the bar of limitation, held that the suit was barred. The time of pendency of the attachment proceedings would not be deducted under this section, as those proceedings were not based on the same cause of action as the suit to recover the debt—*Rangaswamy v. Thangavelu*, 42 Mad 637.

The time occupied by a trustee *de son tort* in defending a suit brought by the lawful trustee for the recovery of the trust estate cannot be deducted in favour of the trustee *de son tort* in a subsequent suit brought by him for the recovery of the out-of-pocket expenses incurred by him for the management of the trust estate, because the causes of action in the two suits are not the same, the trustee *de son tort* having made no counter-claim as regards those moneys in the previous suit—*Abkan Sahib v. Soran Bibi*, 38 Mad. 260.

A proceeding in a Revenue Court for mutation of names and an application for filing an award of arbitrators in respect of title of the parties are two different proceedings founded on separate causes of action, and the time spent in the former proceeding cannot be excluded in computing the period of limitation for the latter proceeding—*Ram Ugrah v. Achraj Nath*, 38 All. 85 (91), 13 A.L.J. 1115

151. Good faith and due diligence :—It has been held in *Ramjiwan v. Chand Mal*, 10 All. 587 (598) that this section contemplates only those cases where the party had been misled into litigating in a wrong Court through *bona fide mistake of fact* as distinguished from *ignorance of law*. But in a later Full Bench case of the same High Court (*Brij Mohun v. Mannu*, 19 All. 348) it has been laid down that a *bona fide mistake of law* may be a sufficient foundation for the grant of indulgence under this section. The Patna High Court holds that proceedings coming under section 14 must be such as are recognised by law as legal in their initiation, though a party has carried the proceedings to the wrong Court. But a party who is proceeding in ignorance of law cannot be said to proceed with due diligence or in good faith. Thus, where the first proceeding was one which was not recognised by law, no deduction of time spent on such proceeding can be made—*Sheo Dhari v. Gupleswar*, 78 I.C 482, A.I.R. 1924 Pat 716.

Ignorance of law or the ill-advice of a pleader does not necessarily or *prima facie* establish a want of good faith. Therefore where a plaintiff instituted a suit in a wrong Court, engaged a pleader and took the usual steps which a litigant is compelled to adopt, it was held that although it was a stupid though not unaccountable blunder, still as it was made *bona fide*, the plaintiff was entitled to deduct the time under this section—*Ram Ravji v. Pralhaddas*, 20 Bom. 133. Proceeding in a wrong court through the *bona fide* mistake of the counsel may be excused under this section, where the party has throughout prosecuted his case with due diligence—*Kishan Lal v. Tika*, 49 All. 555, A.I.R. 1927 All. 719, 101 I.C. 750. But the fact that a litigant acted on the advice of a pleader will not entitle him to get the benefit of the provisions of this section, if the error made is so patent that it could have been avoided with the exercise of

due care—*Ram Sahu v. Iradda*, 22 O.C. 39, 51 I.C. 590. A litigant who takes action without going to the trouble and expense of taking legal advice cannot be said to have exercised due diligence and must take the consequences if he makes mistake. A litigant who consults a legal practitioner of inferior standing and little experience is in no better position. But when the advice is that of a pleader of the Bar, and is given after due deliberation and is followed, the Court cannot, simply because the advice was utterly wrong, hold that the litigant has not exercised due care and diligence—*Fuzhur Ali v. Sahib Nar*, 254 P.L.R. 1913, 20 I.C. 3.

Where the law gives no jurisdiction to a Court or officer in a certain matter, there can be no *bona fide* mistake as to its or his jurisdiction in relation to that matter, and the time spent in a proceeding before such Court cannot be deducted. Thus, under the rules of the Bombay Government, a Collector executing a decree has no jurisdiction to set aside a sale made by him, and a party who makes an application to him to set aside a sale cannot be allowed to deduct the time spent in so doing in computing the period of limitation for a subsequent application to the proper Civil Court—*Narayan v. Rasulkhan*, 23 Bom 531. A proceeding for execution of a decree taken erroneously but *bona fide* and with due diligence before a Court, which had no jurisdiction but which the decree-holder believed to have jurisdiction, is a *bona fide* one within the meaning of this section, and the time occupied in such proceeding will be deducted—*Jahar v. Kamini*, 28 Cal. 238; *Hiralal v. Badridas*, 2 All 792 (P.C.). See also *Pandu v. Jamna Das*, 26 Bom L.R. 470, A.I.R. 1925 Bom 113, 85 I.C. 778. But a proceeding contrary to a clearly expressed provision of law cannot be said to be prosecuted in good faith. Where the High Court in Rangoon has repeatedly said that it does not ordinarily interfere in revision with orders of removal of attachment made under O. 21, r. 60 and that the party should file a suit, but the party filed a revision on the advice of his counsel, and after the revision was dismissed, subsequently filed a suit under O. 21, r. 63, held that the time taken up during revision could not be excluded—*S. R. M. M. A. Firm v. Maung Po Saung*, 7 Rang. 466, A.I.R. 1929 Rang. 297 (298), 120 I.C. 236; *Tun U v. Chettyar Firm*, 8 Bur.L.T. 93, 27 I.C. 829.

This section has no application when *bad faith* is established. Where a person who obtained an *ex parte* decree by fraud subsequently sued the proper person for recovering rent, held that limitation should be computed from the date of the institution of the suit, and that the cause of action could not be deemed to have been in suspense during the pendency of the prior proceeding—*Narpat Singh v. Mahidhar*, 8 Pat. 851, A.I.R. 1930 Pat. 54 (57, 58), 122 I.C. 241.

Where a plaint was returned by the Sub-Judge to be filed in the Munsiff's Court on the ground that the suit had been overvalued, and there was nothing to show want of *bona fides* in the plaintiff, the time spent in the Sub-Judge's Court was deducted—*Obhoy v. Kritartha*, 7 Cal. 284; *Brij Mohan v. Mannu Bibi*, 19 All. 348 (F.B.). Similarly, where a plaint was returned by the Court on the ground that the plaintiff had under-

valued his claim, and there was nothing to show that the under-valuation was deliberate, reckless or *mala fide*, it was held that the time taken up in the wrong Court should be excluded—*Ramdayal v. Saraju*, 17 O.C. 210, 25 I.C. 403; *Seshamma v. Shankar*, 12 Mad. 1; *Rahatulla v. Ibadulla*, 18 I.C. 92; *Bhawani v. Industrial Bank*, 50 I.C. 645, 70 P.R. 1919, 31 P.L.R. 1919; *Chandi v. Jankiram*, 1 B.L.R.S.N. 12. Where a suit was rightly valued and was presented to the proper Court, but the Court mistakingly believing the suit to be under-valued returned the plaint, and then the plaintiff was driven from Court to Court for a period of 6 months, after which he could file his suit again in the right Court, held that he should be given the benefit of this section, as there was no want of good faith or diligence on his part, and he ought not to suffer owing to the mistake of the Court—*Raghubar v. Kanhaiya*, 12 O.L.J. 297, 2 O.W.N. 383, A.I.R. 1925 Oudh 493, 89 I.C. 443.

A claim cannot be said to be not *bona fide* when two Courts concur in decreeing the claim, although the final Court of appeal holds the decree to be erroneous. Therefore the time occupied in the previous suit in which that claim was preferred, from the date of institution of the suit up to the date of the decree in second appeal, should be deducted—*Dinanath v. Jadu Nath*, 29 C.W.N. 202, A.I.R. 1925 Cal. 456, 86 I.C. 130.

A certain document (Collector's certificate under sec. 6 of the Pensions Act) which was necessary to give the Court jurisdiction in a case was not produced, and the defendant did not object to its absence until the case was almost finished; the Court then threw off the case for want of the certificate. In a subsequent suit brought by the plaintiff it was held that the non-production of the document in the previous suit did not constitute such want of diligence on the plaintiff's part as to disentitle him to the deduction of time allowed by the section. The case was one of error committed in good faith and not one of want of due diligence—*Putali Meheti v. Tulja*, 3 Bom. 223.

A suit was brought in the Presidency Court of Small Causes against defendants not resident within the local limits of its jurisdiction, with the leave of the Registrar of the Court, who exercised the powers of the Court. Suddenly it was ruled by the High Court that the leave of the Registrar was not the leave of the Court. The plaintiff's suit was thereupon rejected by the Small Cause Court. Subsequently he instituted a fresh suit after obtaining the leave of the Court, and claimed to deduct the period occupied by the first suit. It was held that he was so entitled. The fact that he instituted the first suit with the leave of the Registrar instead of with the leave of the Court did not amount to any negligence or want of *bona fides* on his part, because up till then the Registrar had been for many years exercising the powers of the Court to grant such leave under a Rule passed by the High Court. The former suit was therefore prosecuted in good faith and with due diligence within the meaning of this section—*Subbarau v. Yagana*, 19 Mad. 90.

In execution of a decree a sum in excess was realised from the defendant. He filed a suit to recover back the amount but it was dis-

missed on the ground that no suit could lie, and the proper remedy was to file an application under section 47 C. P. Code. Thereupon he made an application to obtain refund of the money recovered in excess. Held that in computing the period of limitation for the application the time taken up in prosecuting the suit ought to be deducted, as the suit was brought with due diligence under a *bona fide* mistake—*Ganpatrao v. Anandrao*, 44 Bom. 97.

When in proceedings in execution of a decree for rateable distribution, payment was wrongly made to the defendant, and the plaintiff instead of prosecuting a suit, filed a revision petition in the High Court against the order of wrongful distribution, held that the revision petition was not prosecuted in good faith because no revision could lie while there was another remedy by way of suit; and he was not entitled, in a subsequent suit under section 73 (2) of the C. P. Code, to deduct the time taken by the revision petition—*Bajinath v. Ramadoss*, 39 Mad. 62.

Where the decree on the face of it showed that it was passed by the Court of the Subordinate Judge, and there had been two previous execution applications, both in the Court of the Subordinate Judge, and some money also had been realised, and the heading of the decree showed that it was one of the Subordinate Judge's Court, but still the decree-holder filed the next execution application in the Munsiff's Court, and subsequently re-filed it in the proper Court after the limitation period, held that the decreeholder was not entitled to the protection of sec. 14 as such an act cannot be said to have been done with due care and attention—*Fazlul v. Halaluddin*, 8 P.L.T. 561, A.I.R. 1927 Pat. 256, 101 I.C. 674. Where an appellant should have known that the High Court and not the District Court had jurisdiction to hear an appeal, and yet persisted in appealing to the District Court, held that there was no good faith on his part, and therefore the Court refused to excuse the delay when he afterwards filed his appeal in the High Court—*Daudbhai v. Emnabai*, 28 Bom. 235. The plaintiff filed a suit for damages for malicious prosecution against a Magistrate. The defendant pleaded want of notice under section 80 C. P. Code. The plaintiff went to trial on this issue and his suit was dismissed. Thereafter the plaintiff gave the required notice and again brought a suit and claimed to deduct the time spent in the previous suit. Held, that in view of the well known and old standing procedure requiring previous notice and the clear words of section 80, C. P. Code, the plaintiff could not be said to have acted in good faith in the previous suit, and was therefore not entitled to exemption under this section—*Manghanmal v. Fernandez*, 5 S.L.R. 181, 13 I.C. 260.

A plaintiff cannot be said to have prosecuted a suit with due diligence when owing to his own negligence or default the suit is so framed that the Court cannot try it; as for instance, where the plaintiff omitted to set out certain boundaries of the land in the plaint—*Chunder v. Bissessuree*, 6 W.R. 184 (F.B.); or where the plaintiff neglected to register a compulsorily registrable certificate and to produce the same in Court—*Bai Jumna v. Bai Ichha*, 10 Bom. 604.

The plaintiff brought a suit in a wrong Court on 20-5-1913, and that Court ordered the return of the plaint to the proper Court. But the plaintiff refused to take it back and in 1914 filed a revision against the order to the High Court, which was dismissed on March 16, 1915. On June 15, 1915 the plaintiff having applied for return of the plaint, it was returned to him on June 30 and he filed it on the same day in the proper Court. *Held* that the plaintiff was not entitled to deduction of the time between May 20, 1913 and June 30, 1915, in as much as he could not be deemed to have been prosecuting the case with due diligence in view of the fact that he waited for three months after the dismissal of the revision before he applied for the return of the plaint—*Hameda v. Fatima*, 16 A.L.J. 429, 45 I.C. 991.

A plaint was rejected on the ground of limitation as the plaintiff omitted to set out certain payments of interest by the defendants, which payments if so set out would have saved the suit from being barred by limitation. Thereupon the plaintiff brought a fresh suit setting out all those payments. It was held that the period during which the first suit was pending in the Court was not to be deducted in computing the period of limitation for the second suit, as the omission of the plaintiff to set out the facts of payment amounted to a want of due diligence on his part in conducting the first suit—*Nobin v. Rajomoyt*, 11 Cal 264.

Where each of two plaintiffs came into Court originally to sue separately in respect of a contract which gave them a *joint* but not a *several* right, and this error was pointed out to them and they were given every opportunity of rectifying it, but they elected to proceed with their suits as then framed, and by the time that those suits were dismissed, the period of limitation for a fresh suit had expired, it was held that in these circumstances the plaintiff did not exhibit that degree of diligence which would entitle them to the benefit of this section—*Kalu v. Mehru*, 41 P.R. 1916, 32 I.C. 497.

152. Defect of jurisdiction :—The words “defect of jurisdiction” mean a defect of jurisdiction peculiar to the Court in which the proceedings were taken, and do not cover such mistakes as the presentation and prosecution of an appeal which did not lie in any Court—*Moti Singh v. Maghan*, 22 P.R. 1912, 244 P.L.R. 1911, 11 I.C. 880.

An application for execution to the Court which passed the decree, for the transfer of the decree to another Court, was dismissed on the ground of limitation besides other grounds. It was held that in computing the period of limitation for a subsequent application to the same Court for attachment of the judgment-debtor's property, the time between the filing of the previous application and its dismissal could not be deducted under this section, because the previous application was dismissed on grounds other than defect of jurisdiction, and also because the relief sought in the second application was not the same as that sought in the first—*Theerthaswamigal v. Venkatarama*, 33 M.L.J. 682, 45 I.C. 460. Where a person misconceived his remedy and instead of proceeding by way of an application to set aside an execution sale, brought a suit which-

was eventually dismissed, the time taken in prosecuting the suit (and an appeal therefrom) cannot be deducted under this section in computing the period of limitation for an application, because the failure of the applicant in the prosecution of his claim by suit cannot be attributed to anything connected with the jurisdiction of the Court—*Ganapathi v. Krishnamachari*, 43 M.L.J. 184, 70 I.C. 743, A.I.R. 1922 Mad. 417; *Murugesu v. Jataram*, 23 Mad. 621. Where a Court rejects a proceeding not because it is unable to entertain it on account of defect of jurisdiction but because the proceeding is utterly wrong and misguided as to the liability of the defendant, this section does not apply—*Maneklal v. Suryapur Mills Co., Ltd.*, 52 Bom. 477, A.I.R. 1928 Bom. 252 (257).

Where the Court in which the wrong proceeding was instituted had jurisdiction, but erroneously held that it had no jurisdiction to grant the relief claimed, the time spent in the Court may be deducted under this section—*Abdulla v. Kalumpurath*, 33 M.L.J. 463, 43 I.C. 6. But where the Court in which the previous suit was rightly instituted declined to entertain the suit not because it had no jurisdiction but because that Court (Union Court) thought that it was desirable that the suit should be conducted in a Civil Court in which the question of law would be properly decided, held that this section did not apply—*Bonomali v. Fakir Chand*, 46 C.L.J. 452, A.I.R. 1928 Cal. 46, 106 I.C. 324.

On the 2nd September 1887 the plaintiff filed a suit in the District Munsiff's Court to recover his share of the profits under a partnership agreement with the defendant. In his evidence, the plaintiff stated that there had been a settlement of accounts between himself and the defendant. The suit was thereupon dismissed as being cognizable by the Court of Small Causes, and the plaint was returned on the 1st March 1889. On the 27th March the plaint was filed in the Court of Small Causes. It was held that the period from 2nd September 1887 to 1st March 1889, i.e., the period of pendency of the first suit in the District Munsiff's Court should be deducted under this section—*Saminadha v. Samban*, 16 Mad. 274. Where a suit was instituted in the Presidency Small Cause Court against defendants not resident within the jurisdiction, with the leave of the Registrar, and it was subsequently ruled that the Court and not the Registrar was empowered to give such leave, and the suit having been dismissed, a similar suit was then instituted, the leave of the Judge having been first obtained, it was held that this section applied and the plaintiff was entitled to deduct the time during which the first suit was pending, as the Court had no jurisdiction to entertain that suit until its leave was obtained for proceeding against defendants not resident within the Court's jurisdiction—*Subbarau v. Yagana*, 19 Mad. 90. So also, a plaint was filed in the High Court with leave under clause 12 of the Chapter, such leave having been obtained from the Registrar. Subsequently in another case it was decided that the leave of the Registrar was bad in law. Thereupon the Court rejected the plaint and ordered it to be returned to the plaintiff, who afterwards brought a fresh suit on the same cause of action. Held that section 14 should be applied in calculat-

ing the period for the second suit—*Ramdeo v. Gonesh*, 35 Cal. 924. An application was made before a subordinate Court for execution of a decree passed by itself but that Court after executing the decree in part transferred it to the Presidency Small Cause Court which proceeded to execute it. Afterwards it was discovered that the transfer of the decree was a mistake as the amount exceeded Rs. 2,000, and the decree was returned to the subordinate Court. A fresh application for execution was thereafter made. *Held* that the time during which the decree was in the Presidency Small Cause Court should be deducted in computing the period of limitation for the second application—*Barrow v. Javerchand*, 19 Mad. 67. S obtained a mortgage decree against P in March 1887, in the Hajipore Munsiff's Court. On the 9th September he applied for execution and on 7th November 1887 the mortgaged property was sold by the Hajipore Court. On appeal the High Court set aside the sale on the 2nd September 1890 on the ground that the Hajipore Court had no jurisdiction. On the 6th September 1890 S applied to the Hajipore Court to transfer the decree to the Muzaffarpur Court, and on the 19th December 1890, S applied for execution to the Muzaffarpur Court. *Held* that the decreeholder was entitled to a deduction of all the time occupied in executing the decree in the Hajipore Court, from 9th September 1887 to the 2nd September 1890, if not to the 6th September 1890—*Rajbullabh v. Joy Kishen*, 20 Cal. 29. Where a defendant is found after the issue of summons in a suit to have been dead before the filing of the plaint, the Court has no jurisdiction to decide the suit against him, and the plaintiff may have a deduction of the time occupied in that suit when he subsequently sues the defendant's representatives—*Mohun Chunder v. Azam Gzee*, 12 W.R. 45.

Where a plaintiff, relying upon the defendant's representation as to the latter's place of residence, brought his suit in a Court which had no jurisdiction, the time of the pendency of the suit in such Court was held to be properly excluded—*Banee Madhab v. Bipro Dass*, 15 W.R. 69.

The plaintiff was allowed under this section to deduct the period during which he was *bona fide* seeking redress from the Revenue Court which had no jurisdiction to deal with the question raised by him—*Girjanath v. Ram Narain*, 20 Cal. 264.

A suit for recovery of price of bricks was brought in the Munsiff's Court which passed an *ex parte* decree; the *ex parte* decree was set aside and the suit was reheard. The Court then being of opinion that the suit was cognizable by the Small Cause Court, returned the plaint for representation to that Court. It was held that the plaintiff was entitled to the benefit of this section—*Ford v. Meyer*, 15 A.L.J. 573, 40 I.C. 447.

153. Other cause of a like nature :—Misjoinder of cause of action was held to be a cause of like nature with want of jurisdiction—*Deo Prasad v. Pertab*, 10 Cal. 86, followed in *Mullik Kefait v. Sheo Pershad*, 23 Cal. 821; *Mathura Sing v. Bhdnani*, 22 All. 243 (F.B.); *Venkati v. Murugappa*, 20 Mad. 48 (F.B.); *Venkataramnam v. Ramaraju*, 21 Mad. 361; *Narasimma v. Muttayan*, 13 Mad. 451. The

contrary rulings in *Ram Sabhag v. Bobin*, 2 All. 622, *India Publishers v. Aldridge*, 35 Cal. 728 and *Tirtha Sami v. Sheshagiri*, 17 Mad. 299 are no longer good law in view of Explanation III added to this section.

Misjoinder of parties must also be deemed to be a cause of like nature with defect of jurisdiction. See Explanation III, and *Mathura Singh v. Bhawani*, 22 All. 248 (F.B.). The cases of *Jema v. Ahmed*, 12 All. 207, *India Publishers v. Aldridge*, 35 Cal. 728, *Krishnaji v. Vithal*, 12 Bom. 625, in which the contrary view was held, must be deemed as overruled by Explanation III.

The word 'misjoinder' in Explanation III includes 'non-joinder'. For the purposes of this section there is no distinction between misjoinder and non-joinder. They are only variations of the same defect. Therefore, where one of several decree-holders applied to execute the decree without impleading the other decreeholders as parties, and the application was dismissed, whereupon a subsequent application for execution was properly presented, held that the time occupied in prosecuting the earlier application in good faith should be deducted under this section—*Seth Ibrahim v. Firm of Ghulam Husain*, 15 S.L.R. 11, 62 I.C. 507.

A misconception of the plaintiff as to the Court in which he ought to sue, coupled with the action of the Court in which he instituted the suit on such misconception, in admitting the suit, was held, under the special circumstances of the case, to be a cause similar to defect of jurisdiction—*Seth Kahandas v. Dahiabhai*, 3 Bom. 182. See this case cited in Note 149 ante.

The words "or other cause" refer to cases where the action of the Court is prevented by causes not arising from laches on the part of the plaintiff—*Luchman v. Nimhoo*, 17 W.R. 266. The words mean some unavoidable circumstance over which no one has any control, or something incidental to the Court itself and unconnected with the default or negligence of the plaintiff—*Chunder Madhub v. Bissessuree*, 6 W.R. 184; *Raja of Faridkote v. Sardar Gurdayal*, 34 P.R. 1898. Therefore, this section does not apply where the previous suit was dismissed for plaintiff's default or negligence in prosecuting it—*Chintaman v. Kisan*, 25 N.L.R. 99, A.I.R. 1929 Nag. 219, 116 I.C. 509. The plaintiff was not entitled to deduct the time during which she was engaged in prosecuting the first suit which was dismissed owing to the non-production of a certificate due to her own laches—*Bai Jumna v. Bai Ichha*, 10 Bom. 604; nor can the plaintiff claim exemption when his first suit was dismissed on account of failure to give notice under sec. 80 C. P. Code—*Manghanmal v. Fernandez*, 5 S.L.R. 181, 13 I.C. 260.

This section applies where the Court in which the previous proceeding was instituted was unable to entertain it on account of the Court's defect of jurisdiction or some cause of like nature, that is, on some such technical ground, and therefore rejected it. This section does not apply where the previous proceeding was dismissed after adjudication on its merits, and not because the Court was unable to entertain it—*Issureenund*

v. Parbutty, 3 W.R. 13; *Ardha Chandra v. Matangini*, 23 Cal. 325 (327); *Abbas Ali v. Yusuf Ali*, 28 P.L.R. 158, A.I.R. 1927 Lah. 186; *Sat Bhirai v. Ahmed*, 28 P.L.R. 403, 104 I.C. 726, A.I.R. 1927 Lah. 785; *Rajani Bandhu v. Kali Prasanna*, A.I.R. 1924 Cal 419, 74 I.C. 279. This section will entitle a plaintiff to claim exclusion of time when his previous suit was dismissed without any trial and simply on the case set up in the plaint; where the previous suit was dismissed on the findings arrived at by the Court, it cannot be said that the suit was dismissed without trial, and consequently this section cannot apply—*Narayanan v. Kannammal*, 28 Mad 338 (341, 342). Therefore in calculating the period of limitation prescribed for a suit brought by the adopted son to set aside an alienation made by his adoptive mother, the period of pendency of suits brought by or against him to prove or disprove the validity of his adoption will not be deducted, because such suits were properly brought and adjudged on their merits—*Kishen v. Muddun*, 5 W.R. 32. An objector's claim having been disallowed, he brought a regular suit to establish his right and to have the sale stayed. The attached property was however sold pending this suit which was subsequently dismissed on its merits. He then brought another suit for declaration that the property (which was still in his possession) was his and was not affected by the sale; it was held that in calculating limitation for the second suit no deduction could be made for the time consumed in the first suit—*Raghunath v. Soorjoo*, 2 W.R. 162

Where the previous suit was dismissed not on any technical ground of misjoinder of parties or of causes of action but on the ground that having regard to the frame of the suit no cause of action had been established against the defendants, held that this section would not apply and the time taken up by the previous suit would not be deducted—*Commercial Bank v. Allavooddeen*, 23 Mad 583 (590)

Plaintiff at first instituted a suit in 1893 for possession and mesne profits from 1889 to 1893 (the date of suit) as well as from 1893 to the date of recovery of possession. The suit was decreed in January 1895 but the mesne profits were awarded only up to 1893 (the date of suit), the decree being silent as to the mesne profits from 1893 to 1895. Plaintiff thereupon instituted in April 1898 a second suit for mesne profits from 1893 to January 1895. Held that the suit was barred; the time of pendency of the previous suit would not be deducted, because it could not be said that the former Court was unable to entertain the former suit from defect of jurisdiction or other cause of like nature. In fact the Court did entertain the former suit and there was no defect of jurisdiction which prevented the Court from awarding the mesne profits claimed, but it did not decree the mesne profits either through inadvertence or because the claim was not specially pressed—*Hays v. Padmanand*, 32 Cal. 118

Plaintiff's suing by mistake on a foreign judgment, which was a nullity, cannot be held to be a cause of like nature with defect of jurisdiction—*Raja of Faridkote v. Sardar Gurdayal*, 34 P.R. 1898.

Where, relying upon a decision of the High Court, a decreeholder

instituted proceedings in the Insolvency Court, and then by a subsequent Full Bench Decision of the High Court it was declared that those proceedings must be taken in the Revenue Court and not in the Insolvency Court, whereupon the decreeholder applied to the Revenue Court, *held* that the time during which the proceedings were pending in the Insolvency Court would be deducted—*Parbati v. Raja Rikh*, 44 All. 296 (300), 20 A.L.J. 147, 66 I.C. 214.

Res judicata does not constitute a "cause of like nature." Thus, a decree-holder made an application for execution of his decree on 6th October 1915 which was dismissed for default. Thereupon the judgment-debtor who also held a decree against the decreeholder applied for execution of his decree against him, and the decree-holder made an application on 15th November 1916 for being allowed to set off his decree against the decree of the judgment-debtor, but the decree-holder's application was disallowed on 23rd May 1918 on the ground of *res judicata*. Subsequently the decreeholder made an application for execution of his decree and claimed to deduct the time between 15th November 1916 and 23rd May 1918. *Held* that he was not entitled to get the deduction—*Braja Gopal v. Tara Chand*, 6 P.L.J. 593, 63 I.C. 593, A.I.R. 1921 Pat. 225.

Where a prior suit for declaration of title was dismissed as not maintainable because it contained no prayer for possession, the time taken in prosecuting that suit can be deducted as the defect was of a nature similar to a defect of jurisdiction—*Venkamma v. Parthasarathi*, 51 M.L.J. 391, A.I.R. 1926 Mad. 1081, 98 I.C. 14. An application for execution of a decree was dismissed because the relief asked for was not in conformity with the decree, the legitimate prayer for the execution of the decree being joined with a prayer which the Court was not competent to grant. *Held* that the time occupied in this application should be deducted in calculating the period for a subsequent application, as the former application was dismissed for a cause of a nature similar to defect of jurisdiction—*Keshore Mal v. Jagdish Narain*, 3 Pat. 42, 75 I.C. 312, A.I.R. 1924 Pat 471.

154. Withdrawal of previous suit :—This section applies only to cases where the previous suit was *dismissed* by the Court itself because it was unable to entertain it, it does not apply where the previous suit was voluntarily abandoned or *withdrawn* by the plaintiff. When the previous suit had been terminated not by any action of the Court but by the act of the plaintiff, he cannot claim the benefit of this section—*Arunachalam v. Lakshman*, 39 Mad. 936; *Varajlal v. Shomeswar*, 29 Bom. 219; *Upendra v. Surya Kanta*, 20 I.C. 205, *Krishnaji v. Vithal*, 12 Bom. 625; *Bal Jumna v. Bal Ichha*, 10 Bom. 604, *Pirjade v. Pirjade*, 6 Bom. 681. If a suit is withdrawn by the plaintiff under O 23, r. 1 with permission to bring another suit, and a fresh suit is instituted, the plaintiff is bound by the law of limitation in the same manner as if the first suit had not been instituted—*Varajlal v. Shomeswar*, *supra*; *Rahim Ali v. Yehia*, A.I.R. 1928 All. 402. But if the Court was not *competent* to entertain the suit, and the suit was withdrawn with the leave of the

Court, the order of withdrawal might be treated as an order returning the plaint, and the provisions of sec. 14 would apply to the suit when re-instituted—*Ramdas v. Gonesh Narain*, 35 Cal. 924, 12 C.W.N. 921.

155. Deduction of time.—Where a plaint which had been presented to the wrong Court on the last day of the period of limitation, was subsequently returned by the Court for presentation “within a week” to the proper Court, and then the plaint was filed in the proper Court within a week, it was held that the suit when so presented was barred by limitation, as only the time during which the suit was pending in the wrong Court should be excluded; and the fact that the Court had given a week's time should not be taken into account—*Haridas v. Sarat*, 17 C.W.N. 515, 18 I.C. 121. The principle is that a Court in returning a plaint to a plaintiff in a suit in which it had no jurisdiction had no authority to fix a time within which the plaint was to be presented to a Court having jurisdiction, and if it does so, that fact will not in any way affect the time to be allowed to the plaintiff—*Gauri Nangiah v. Piadatala Venkatappa*, 5 M.H.C.R. 407. So also, where a plaint was returned to be re-presented to another Court, and no steps were taken for 10 days thereafter, by which time the suit was barred, held, that the delay could not be excused—*Fateh Mahammad v. Raja*, 26 P.L.R. 342; *Sheo Narain v. Ram Prasad*, 8 N.L.J. 76, A.I.R. 1923 Nag 241, 74 I.C. 317.

Closing of wrong Court :—The last day for filing a suit was 14th June 1908. But as the Court in which the suit was sought to be filed was closed from 14th June to 5th July, the suit was filed on 6th July 1908. On 17th February 1909, the Court found that it had no jurisdiction and returned the plaint to the plaintiff for presentation to the proper Court. The plaintiff presented it to the proper Court on the next Court day, *i.e.*, 19th February 1909. It was held that under sec. 14th plaintiff was entitled to the deduction of time between 6th July 1908 and 17th February 1909, *i.e.*, the time during which the suit was *actually prosecuted* in the wrong Court, but not to a deduction of the period between 14th June and 5th July 1908, during which the wrong Court was closed; held further, that the plaintiff could not invoke the aid of section 4 for deducting the latter period, as the word ‘Court’ in that section does not include a wrong Court—*Mira Mohideen v. Nallaperumal*, 36 Mad. 131; *Ummathu v. Pathumma*, 44 Mad. 817; *Sheshagiri v. Vajra Velayudam*, 36 Mad. 482, *Govindasami v. Sami Padayachi*, 43 M.L.J. 579, 69 I.C. 724; *Makund v. Ramraj*, 14 A.L.J. 310, 35 I.C. 292 (293); *Bano Mal v. Bano Mal*, 55 I.C. 55 (Lah.); *Maqbul v. Pateshri*, 27 A.L.J. 976, A.I.R. 1929 All. 677, 118 I.C. 670; *Dharma v. Ganga Ram*, 11 Lah. 12, A.I.R. 1929 Lah. 425, 116 I.C. 314, 31 P.L.R. 396. Contra—*Basvanappa v. Krishnadas*, 45 Bom. 443, where it was held (dissenting from 36 Mad 131) that the period during which the wrong Court was closed should also be deducted.

The time taken in obtaining certified copies of the judgment or order of the first Court for the mistaken institution of the appeal which ultimately proved infructuous, should also be deducted from calculation, because the plaintiff is said to have been prosecuting a civil proceeding during.

the period he was taking the preparatory steps for the filing of the appeal by way of applying for copies of judgment and decree—*Lakshmiram v. Sonatan*, 15 C.L.J. 160, 7 I.C. 775. But the plaintiff is not entitled to deduct the time taken in obtaining a certified copy of the order of rejection of the plaint passed by the Court in which the suit had been wrongly filed—*Bonomali v. Fakir Chand*, 46 C.L.J. 452, A.I.R. 1928 Cal 46, 106 I.C. 324.

Closing of proper Court :—Where a plaint presented within time in a wrong Court was returned to the plaintiff on a date after limitation had expired, and the next three days being holidays, it was presented before the proper Court on the fourth day, *held* that in the circumstances the suit was not barred by limitation, as the plaintiff could not present the plaint to the proper Court before the date on which he did, owing to the holidays of that Court—*Bejoy Kumar v. Kusum Kumari*, 33 C.W.N. 221 (225).

156. Suspension of right of action :—Two out of three brothers were dispossessed of their shares in certain properties by the third brother. One of the brothers who were dispossessed brought a suit for the recovery of his share as against the other two brothers as defendants. One of the defendants supported the plaintiff and set up his own right to one-third share in the property. An issue was raised between the co-defendants as to whether the defendant who supported the plaintiff was entitled to a certain share. The Court passed a decree not only in favour of the plaintiff but also declared that the defendant had one-third share. On appeal the decree of the trial Court was set aside so far as the defendant was concerned. He then filed a suit for the recovery of his share. It was held that he was entitled to deduct the period from the date of the decree of the first Court to the date when that decree was set aside on appeal, i.e., the period during which there was the judgment of the lower Court in his favour in the previous suit; that a Court should relieve parties against injustice occasioned by its acts and oversights, that where the plaintiff could not have sued for some relief which had been decreed to him by mistake, his right of action should be considered as suspended, and that the time during which his right was suspended should be deducted, although it was doubtful whether this section covered the cause or not—*Lakhan Chandra v. Madhu Sudhan*, 35 Cal 209, affirmed by the Privy Council in *Nrityamoni v. Lakhan*, 43 Cal 660 (663), 20 C.W.N. 522, 33 I.C. 452, where their Lordship laid it down as a general principle that the limitation would remain in suspense whilst the plaintiffs were *bona fide* litigating for their rights in a Court of justice. And so, where the plaintiff obtained a decree for rent which was reversed on appeal on the ground that the provisions of sec. 12 of the Rangoon Rent Act had not been satisfied, and thereafter the plaintiff again sued for rent, *held* that as long as the previous decree was in existence, i.e., until it was set aside by the appellate Court, the plaintiff could not file another suit for rent, and therefore in the second suit the plaintiff was entitled to deduct the whole of the period during which he had been litigating his claim in the previous suit, viz. the period from

the date of institution of that suit (and not from the date of the decree) upto the date of the appellate decree—*Bhandari v. Nihalchand*, 6 Rang. 691, 117 I.C. 52, A.I.R. 1929 Rang. 55 (57).

In computing the period of limitation for a suit against a Ruling Chief (e.g. the Gaikwar of Baroda) the plaintiff is not entitled to deduct the time spent by him in obtaining the Government of India's consent under sec. 86, C. P. Code. Secs. 4 to 25 contain no statutory provision enabling the plaintiff to deduct that time—*Sayaji Rao, Gaikwar of Baroda v. Madhavrao*, 53 Bom. 12, 30 Bom.L.R. 1463, A.I.R. 1929 Bom. 14 (19, 23), 115 I.C. 369.

The plaintiff purchased a *patni* at a sale under the Patni Regulation in May 1908. The patnidar instituted a suit for cancellation of the sale which was decreed in May 1912. In the interval, on 14th October 1910 the plaintiff had paid rent to the defendant to prevent further sale under the Regulation. The plaintiff now brought a suit in 1916 for recovery of the money paid by him to the Zemindar as rent, and claimed to deduct the time which was occupied by a proceeding for assessment of mesne profits as between himself and the original patnidar on the basis of the decree for cancellation of the sale. *Held* that the plaintiff was not entitled to a deduction of the period. There was not since the 14th October 1910 any period of time during which the right of the plaintiff to institute the present suit was suspended by reason of circumstances over which he had no control, so as to entitle him to invoke the aid of the rule recognised by the Judicial Committee in 7 M.L.A. 323 (*Prannath v. Rookia Begum*) 12 M.L.A. 244 (*Surnomoyee v. Shooshee*) and 43 Cal. 660 (*Nrityamoni v. Lakhan*), and to deduct the period—*Janaki Nath v. Bejoy Chand Mahatab*, 26 C.W.N. 271, 60 I.C. 698, 33 C.L.J. 366. For other cases, in which the principle of the suspension of cause of action has been discussed, see *Niranka v. Atulkrishna*, 28 C.W.N. 1009, A.I.R. 1925 Cal. 67, 83 I.C. 110; *Dina Nath v. Jadu Nath*, 29 C.W.N. 202, 86 I.C. 130, A.I.R. 1925 Cal. 456; *Abdul Rahim v. Ojamshee*, 56 Cal. 639, A.I.R. 1930 Cal. 5 (9, 10); and the cases cited in Note 102 under sec. 9.

156A. Sub-section (2):—An application to set aside an *ex parte* decree passed by a Small Cause Court was originally presented on 29th March before a Munsiff where it remained pending for some days. The Munsiff returned the application for being filed in the Court which passed the decree, whereupon it was filed in the Court of the second Munsiff by whom the decree had been passed, but by mistake the application was registered as an ordinary application to set aside an *ex parte* decree in an ordinary money suit, and the mistake was discovered on 7th August, i.e., several months afterwards. *Held* that in computing the period of limitation for the application under Art. 164, the judgment-debtor was entitled to a deduction of the time from 29th March to 7th August, during which he had been wrongly but diligently prosecuting his application—*Basiruddin v. Sonaula*, 15 C.W.N. 102 (106).

Under the Act of 1877, in computing the period of limitation for

an application, the time during which the applicant had been prosecuting an application in a wrong Court could be deducted; but no time was deducted where the applicant had been prosecuting a suit in a wrong Court. See *Shoeji Ram v. Shoo Chand*, 63 P.R. 1886. But this is no longer good law, because under sub-section (2) of the present section, the time during which the applicant had been prosecuting another civil proceeding (which includes a suit) will be deducted. See *Ganapathi v. Krishnamachari*, 43 M.L.J. 184, A.I.R. 1922 Mad. 417, 70 I.C. 743.

157. Explanation 1 :—Termination of proceedings.—Where a plaint is ordered to be returned for presentation to the proper Court but is actually returned three days later, the suit in the wrong Court is said to terminate on the day on which the plaint is actually returned and not on the day on which it is ordered to be returned. The reason is that a party cannot always get back his plaint on the same day on which it is ordered to be returned; and as long as the plaintiff has exercised ordinary diligence in pursuing his claim, there is no reason why the period up to the day when he gets back his plaint should not be deducted—*Nagindas v. Maganlal*, 46 Bom. 211, 64 I.C. 160, A.I.R. 1922 Bom. 160; *Basvanappa v. Krishnadas*, 45 Bom. 443; *Mohendra v. Nanda*, 17 C.W.N. 1043, 20 I.C. 183.

A suit was filed in the munsiff's Court which he dismissed as being beyond his jurisdiction, and this order of dismissal was upheld on second appeal by the High Court, who directed the lower Appellate Court (Dt. Judge) to ascertain the value of the land in dispute and pass a fresh order. After that inquiry was held the Judge passed an order (on 30th October 1883) confirming the original order of the Munsiff. The plaintiff thereupon filed a second suit. *Held* that the plaintiff was entitled to be allowed the whole of the time occupied in the first suit up to the date of the final order of the District Judge (30th October 1883), that the order of the High Court did not terminate the prior suit, and that the suit terminated only when the District Judge passed an order after holding the inquiry—*Sankaran v. Parvathi*, 12 Mad. 434.

Where a plaint was returned on the 27th June with a permission to refile it in the proper Court, and with a direction to the plaintiffs to pay costs, and an order fixing the amount of costs was recorded on the 30th June, it was held that the return of plaint on June 27 terminated the connection of the Court with the suit, and though the costs were calculated later, the plaintiffs could not be said to have been prosecuting their suit in that Court after the plaint had been returned—*Ganga Charan v. Akhil Chandra*, 24 C.L.J. 355, 35 I.C. 595.

158. Application of section to special or local laws :—According to section 29 as now amended by the Indian Limitation Amendment Act (1922), this section applies although the case is governed by a special or local law of limitation, unless it is expressly excluded by the special or local law. Thus, it applies to a suit under the Bengal Tenancy Act. Section 185 of that Act which excludes certain sections of the Limitation Act, does not mention sec. 14—*Raja Sati Prosad v.*

Gobinda, 33 C.W.N. 227 (229), A.I.R. 1929 Cal. 325. So also, this section would apply to a suit under the Agra Tenancy Act (1926), because sec. 231 of that Act neither expressly nor impliedly excludes sec. 14—*Ananti v. Chhannu*, 28 A.L.J. 256 (F.B.), A.I.R. 1930 All 193 (200 205), 124 I.C. 540. Even before the Amendment, this section was applied to a suit or application under a special or local law, e.g. to a suit under sec. 78 of the Madras Rent Recovery Act (VIII of 1865)—*Kallayappa v. Lakshanpathi*, 12 Mad. 467; or to a suit under the Madras Boundary Act (XXVII of 1860)—*Seshamma v. Sankara*, 12 Mad. 1; or to a suit under sec. 86 of the Bombay District Municipal Act (VI of 1873)—*Guracharya v. President*, 8 Bom. 529, or to a proceeding under the Provincial Insolvency Act—*Dropadi v. Hira*, 34 All 496 (F.B.).

The following cases in which this section was held inapplicable to suits or applications under special or local laws on the ground that those laws were complete codes in themselves, are no longer good law in view of the recent amendment of section 29:—*Nagendra v. Mathura*, 18 Cal. 368 (suit under Act X of 1859); *Abdul Hakim v. Latifunnessa*, 30 Cal. 532, *Kalimuddin v. Sahibuddin*, 47 Cal. 300 F.B., *Khagendra v. Bamani*, 24 C.W.N. 29 (cases under sec. 77, Registration Act), *Trasi Deva v. Parameshwaraya*, 39 Mad. 74 (case under Prov. Insolvency Act); *Chowdhury Kesri v. Giani Ray*, 29 Cal. 626 (application to set aside sale under sec. 310A C. P. Code 1882); *Lakshman v. Keshav*, 6 N.L.J. 205, A.I.R. 1923 Nag. 306 (suit under C. P. Land Revenue Act).

In *Fatela v. Siti*, A.I.R. 1926 Nag. 126 (decided in 1923), this change in the law has been overlooked.

Sec. 14 does not apply where the special Act provides special rule of limitation which derogates from the provisions of the general rule embodied in sec. 14—*Ram Lochan v. Jagat Narain*, A.I.R. 1927 All 181, 98 I.C. 1050.

15. (1) In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded.

159. Scope:—The words "or application for the execution of a decree" has been added in the Act of 1908. Sub-section (2) is new.

Under the Act of 1877 this section applied only to suits; and therefore where the execution of a decree was stayed by an injunction, it was held that the time during which the injunction was in force was not to be excluded in computing the period of limitation—*Rajaratnam v. Shevlayam*, 11 Mad. 103 (105); *Kalyanbhai v. Ghanashamlal*, 5 Bom. 29; *Lachmi Chand v. Ballam*, 17 All. 425 (427); *Lutful v. Sambhudin*, 8 Cal. 248; *Amulya v. Peco*, 7 I.C. 886.

But the Court in many cases relieved the decree-holder from this "monstrous injustice" by treating the application for execution made after the withdrawal of an injunction as an application to revive or continue the previous application (Article 181). See *Kalyanbhai v. Ghanashamlal*, 5 Bom. 29, *Basant Lal v. Batal Bibi*, 6 All. 23, *Sakina v. Ganesh*, 3 P.L.J. 103, 44 I.C. 560; *Narayan v. Sono*, 24 Bom. 345; *Chintaman v. Balshastr*, 16 Bom. 294; *Issur v. Abdul*, 4 Cal. 877, *Ashrafuddin v. Bepin Behari*, 30 Cal. 407, *Gurudeo v. Amrit*, 33 Cal. 689, *Lakshmi v. Ballam*, 17 All. 425, *Rungiah v. Nanjappa*, 26 Mad. 780. See these cases in Note 694 under Article 181.

But now, under the present section as amended by the Act of 1908, the time during which the execution is stayed by an injunction or other shall be excluded. See *Bai Ujam v. Bai Rakhmani*, 38 Bom. 153, 21 I.C. 713; *Ghulam v. Hardeo*, 34 All. 436

But the law as amended by the Act of 1908 does not prohibit either expressly or by necessary implication the making of an application for revival which the Courts both before and after the commencement of the Act of 1908 have treated as competent. It is not correct to say that the amendment of sec. 15 was intended to sweep away and replace the old doctrine of revival. The principle of allowing a right of revival of previous application is different and distinct from that permitting exclusion of time during which execution was stayed by an injunction. The two principles are not co-extensive or identical. In cases where there has been no previous application for execution, but proceedings in execution have been stayed, sec. 15 may be of help, whereas the doctrine of revival would have no application. Similarly there may be cases where after the removal of the bar a previous application has been properly and finally disposed of. In such cases also, no question of revival can arise, but the decree-holder will be entitled to deduct the period of suspension in consequence of the stay order or injunction. On the other hand, there may be cases to which sec. 15 cannot apply, and yet the doctrine of revival may be of utility. For instance, execution proceedings may be postponed by an agreement between the parties under some arrangement for payment during a definite period after which the decree-holder may request the Court to revive it. There is an essential difference between a fresh application for execution of a decree after a previous execution has been stayed by an injunction, and an application to a Court asking it simply to revive a previous application made for the execution of a decree. Section 15 would apply to the application of the former class; while an application of the latter class

would be governed by Article 181. Suppose the decree-holder seeks the execution of a money-decree by the arrest of the judgment-debtor. The judgment-debtor institutes a suit to obtain a declaration that the decree was obtained by fraud, and he obtains an injunction staying the execution of the decree. If, after the dismissal of the suit, the decree-holder does not ask the executing Court to proceed with his application for the arrest of the judgment-debtor but makes an application to it to attach the property of the judgment-debtor, and to execute the decree in that way, this application would be a fresh application and would be governed by Art. 182 read with sec. 15. If, on the other hand, the decree-holder should apply to the executing Court to proceed with the arrest of the judgment-debtor, he would be simply asking for a revival of the proceedings which were still pending, and his application would not be governed by the rule contained in section 15—*Chhattar Singh v. Kamal Singh*, 49 All. 276 (F.B.), 25 A.L.J. 201, 100 I.C. 692, A.I.R. 1927 All. 16.

160. Application of section to special laws :—Before sec. 29 was amended by Act X of 1922, it was held that the provisions of section 15 could not be applied to a special period of limitation prescribed by the Bengal Tenancy Act; and therefore sub-section (2) could not apply to a suit instituted under the terms of section 104H of the Bengal Tenancy Act. Such a suit was to be brought within six months as specified in that section, and the plaintiff was not entitled to exclude the period of notice to the Secretary of State (under sec. 80 C. P. Code) whom he had made or joined as a defendant—*Secretary of State v. Gangadhar*, 45 Cal. 934; *Gangadhar v. Janakimani*, 22 C.W.N. 817, 47 I.C. 524; *Secretary of State v. Shib Narain*, 46 Cal. 199, 22 C.W.N. 802. See also *Jurawan v. Mahabir*, 40 All. 198 (203), 16 A.L.J. 71, where it was held that the word 'prescribed' in this section referred to a period 'prescribed by the Limitation Act.' These rulings are no longer good law in view of the present amendment of sec. 29. See *Srinivasa v. Secretary of State*, 38 Mad. 92, where sub-section (2) of this section was applied to a suit under sec. 59 of the Madras Revenue Recovery Act (II of 1864).

161. Section 48 C. P. Code :—The period of 12 years mentioned in section 48 Civil Procedure Code is not a 'period of limitation' in the strict sense of the term and consequently section 15 of the Limitation Act cannot apply to it. Hence an application for execution or a decree stayed by injunction or order of Court, filed after twelve years from the date of the decree cannot be saved by excluding under section 15 the time during which execution was stayed—*Subbarayan v. Nataranjan*, 45 Mad. 785, 43 M.L.J. 168, A.I.R. 1922 Mad. 268

162. Injunction or order :—In computing the period of limitation for execution of a decree the period during which the execution has been stayed or suspended will have to be excluded, though no execution proceedings were pending at the time—*Govindarajulu v. Ranga Row*, 40 M.L.J. 124, 62 I.C. 255.

An adjournment of the hearing does not amount to an injunction or order staying execution of the decree—*Thakamani v. Nadiar*, 36 I.C. 939 (Cal.). An order merely giving time to the judgment-debtor for payment is not an order staying execution or an injunction, and sec. 15 does not apply—*Amin Chand v. Khali*, 28 P.L.R. 93, 100 I.C. 475, A.I.R. 1927 Lah. 106; *Jurawan v. Mahabir*, 40 All. 198 (203). But in a Patna case, where upon an application for execution by the decree-holder, the judgment-debtor paid a portion of the decretal amount and asked for time to pay the balance, whereupon the Court granted him a certain time, it was held that as the decree-holder was not entitled to execute the decree during the time granted by the Court, the order granting time was an order staying execution, and the time could be deducted under sec. 15—*Ganga Singh v. Sheo Prasad*, 7 Pat. 829, A.I.R. 1929 Pat. 36 (37), 117 I.C. 890. Where the stay of the execution-sale of the attached property is due entirely to the decree-holder, the order staying the sale cannot be said to be a legal stoppage of the execution proceedings, and the decree-holder is not entitled to any deduction of time under this section—*Kesho Prasad v. Harbans*, 2 P.L.T. 22, 53 I.C. 85 (89).

In an appeal to the Privy Council, the appellant whose suit has been dismissed by the High Court offered as security for costs a rent decree in another suit obtained by him against the respondent. It was held that the acceptance of the rent decree as security did not involve any order staying its execution so as to enable the appellant to deduct the time that elapsed between the acceptance and his subsequent application for execution of the rent-decree—*Midnapore Zamindari Co. v. Deputy Commissioner*, 3 P.L.J. 132, 44 I.C. 570.

An order of adjudication adjudging the defendant as an insolvent is not an order staying suit against the defendant, because its effect is not to stay proceedings against the defendant insolvent, but merely to impose on the plaintiff the necessity of obtaining leave from the Court to sue under section 16 (2) of the Provincial Insolvency Act. Therefore the period during which the insolvency proceedings were pending could not be excluded—*Ramaswami v. Gobindaswami*, 42 Mad. 319, 36 M.L.J. 104, 49 I.C. 625, *Sidhraj v. Alli Haji*, 47 Bom. 244, A.I.R. 1923 Bom. 33, 67 I.C. 757; it is only when the leave is refused that it can be said that there is an injunction or order staying the institution of the suit—*Sidhraj v. Ali Haji* (supra). (In *Parameswaran v. Seshan*, 51 Mad. 583, A.I.R. 1928 Mad. 627, the question was raised but not decided). But an order striking off an execution petition on the ground that the judgment-debtor had been adjudicated an insolvent and the decretal amount had been entered in the schedule of debts, amounts to an injunction within the meaning of this section—*Firm of Tara Chand v. Jugul Kishore*, 1919 P.W.R. 17, 51 I.C. 64.

Where the tenants instituted a suit against the landlord to set aside the Collector's order passed under sec. 70 of the Bengal Tenancy Act and obtained an injunction restraining the landlord from executing the Collector's order pending the disposal of the suit, and upon that suit

being finally dismissed the landlord applied for execution of the Collector's order, *held* that limitation for execution did not run for the period during which the injunction subsisted—*Balukchand v. Nathuni*, 2 P.L.J. 24 (29).

In computing the period of limitation for execution of a decree the decree-holder is entitled to deduct the period during which the execution is stayed by an injunction, and the fact that the injunction related only to a *part of the decree* is immaterial—*Bai Ujam v. Bai Rukhmani*, 38 Bom. 153 (156). But where there are several joint judgment-debtors, and there is a stay order as against only one of them, the period should be excluded from computation as against that judgment-debtor only but not as against the others—*Parameswaram v. Seshan*, 51 Mad. 583, 55 M.L.J. 156, A.I.R. 1928 Mad 627 (630), 110 I.C. 518, dissenting from *Vellayyan v. Muthayya*, 1921 M.W.N. 188, 61 I.C. 901, A.I.R. 1921 Mad. 116.

The 'order' mentioned in this section refers to an order of a Civil Court, and not to an order of Government or Royal Proclamation by which the plaintiffs (a German Bank) were debarred from bringing a suit owing to declaration of war with Germany—*Duetsche Asiatische Bank v. Hira Lal*, 46 Cal 526 (533), 23 C.W.N. 157.

This section is not confined to cases of direct stay or injunction, but can be extended to orders which indirectly but very approximately and effectually cause a delay. Thus, where pending an appeal to the Privy Council by the judgment-debtor the High Court made an order allowing the decree-holder to execute the decree on his furnishing security for the amount of the decree within one month, but the decree-holder being unable to find the required security, his application for execution was dismissed, and the Privy Council eventually dismissed the appeal for default of prosecution, whereupon the decree-holder again applied for execution; *held*, that the order of the High Court, whatever be the form of it, did in fact stay the execution of the decree and prevent him from executing the decree unconditionally as he was entitled to do. As the condition could not be performed, the effect was to stay execution altogether, and under this section the time during which the order was in force should be deducted in reckoning the period of limitation for filing the present execution petition—*Pandey Satdeo Narain v. Radha Kuar*, 5 P.L.J. 39 (43, 44), 53 I.C. 9.

Under this section, the decree-holder is entitled to exclude not only the period during which he was restrained by an injunction from executing the decree, but also the period during which the decree was not in existence, owing to an order of the Court declaring the decree to be null and void—*Ram Gulam v. Raj Kumar*, 6 Pat 635, 102 I.C. 327, A.I.R. 1928 Pat. 86.

Where pending an appeal from a preliminary decree for foreclosure, a Receiver is appointed for the management of the mortgaged properties with a direction to pay interest, *held* that so long as the order appointing the Receiver stands, the defendants are entitled to pay off the decretal amount and that consequently the order of appointment of the Receiver

operates as a stay of the plaintiff's right to apply for a final decree or for possession, and that therefore the period between the making of the order and the date on which the Receiver is discharged must be excluded in computing the period of limitation for an application for a final decree for foreclosure—*Chhotey Narain v. Kedar Nath*, 1 Pat 435 (442), 3 P.L.T. 565, A.I.R. 1922 Pat. 201, 66 I.C. 97.

In a suit brought by the widow of a deceased partner to wind up the partnership, the surviving partner was prohibited by the Court, at the instance of the plaintiff, from collecting debts due to the firm. Subsequently a Receiver was appointed to get in the assets of the firm. It was held that in a subsequent suit by the Receiver against a debtor, the time between the date of the injunction and the appointment of the Receiver must be deducted from computation of the period of limitation—*Shunmugan v. Moidin*, 8 Mad. 229.

An order staying execution of the decree must be a clear one, but it is not necessary that the order should be in writing—*Vishvanath v. Narsu*, 23 Bom L.R. 107, 60 I.C. 916.

An order under sec. 2 of the Chota Nagpur Encumbered Estates Act bringing the estate under protection is a vesting order staying all proceedings, and if the estate is restored to the owner under the circumstances mentioned in clause 2 of sec. 12, all proceedings are revived, and in calculating the period of limitation for such revived proceedings, the provisions of sec. 15 of the Limitation Act will apply and the period during which the estate was under protection will be excluded—*Mathura Prasad v. Jageshwar Prasad*, 5 Pat 404, 9 P.L.T. 247, A.I.R. 1926 Pat 260 (262), 94 I.C. 624, *Tikait Mahabir Prasad v. Chota Nagpur Banking Association*, 8 P.L.T. 189, A.I.R. 1927 Pat 105. But if the estate is restored to the owner not under the circumstances mentioned in clause 2 of sec. 12 of the Chota Nagpur E. E. Act, there is no revival of proceedings; the injunction or stay of proceedings is still in force, and the consideration of sec. 15 of the Limitation Act does not arise—*Khairullah v. Panday Lachmi Ram*, 7 Pat 109, A.I.R. 1928 Pat. 179 (182), 105 I.C. 643, 9 P.L.T. 252.

Attachment.—An order of attachment of a debt under sec. 268 of the C. P. Code (1882) is not an injunction or order staying a suit on the debt within the meaning of this section, because the order does not prevent the creditor from bringing a suit on the debt, but only from receiving from the debtor the amount thereof; if therefore the creditor does not bring a suit on the debt within the prescribed period it will be barred—*Shib Singh v. Sita Ram*, 13 All. 76, *Beti Maharani v. Collector of Etawah*, 17 All. 198 (P.C.); *Rangaswami v. Thangavelu*, 42 Mad 637, 50 I.C. 380. And the result is the same if the attachment of the debt be before or after judgment—*Beti Maharani v. Collector of Etawah*, 17 All. 198 (P.C.).

An attachment before judgment of a decree and a consequent order issued by the Court attaching the decree amounts to an absolute prohibition of the execution of the decree by anybody; it amounts to an

Sub-section (2) must not be read into the provisions of section 8. This sub-section has nothing to do with the extension of time allowed to persons under disability under sections 6 and 8. The section 49 of the Court of Wards Act requires two months' notice to be given before the institution of a suit under that Act; but this period of two months shall not be added to the extension of time allowed to persons under disability under sections 6 and 8—*Narasimha v. Krishna Chandra*, 37 M.L.J. 256, 52 I.C. 725.

16. In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

Exclusion of time during which proceedings to set aside execution-sale are pending.

165. The period of limitation for a suit for possession by an auction-purchaser referred to in this section is prescribed by Articles 117 and 138.

The word "proceeding" in this section is not restricted to a proceeding other than a suit, *i.e.*, to an application to set aside a sale, but is comprehensive enough to include a suit as well as an application; the obvious intention of the Legislature is to allow an exclusion of the period during which the validity of the sale is in controversy, whether the sale is impeached by a suit or by an application—*Promotho v. Kishor*, 21 C.W.N. 304 (309), 38 I.C. 547.

17. (1) Where a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

Effect of death before right to sue accrues.

(2) Where a person against whom, if he were living, a right to institute a suit or make an application would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

(3) Nothing in sub-sections (1) and (2) applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office.

166. Principle :—This section adopts the general rule that a complete cause of action cannot accrue unless there be a person in existence capable of suing another person in existence capable of being sued. It clearly assumes the existence of the general law that the legal representative holds the property in the right of the deceased, and that it is his duty to sue in respect of a cause of action that has accrued after the death of the testator, and it further provides that the time shall not begin to run until the question as to who is the legal representative of the deceased has been solved—*Kesho Prasad v. Madho Prasad*, 3 Pat. 880 (907), A.I.R. 1924 Pat. 721. The principle of this section is that in order that a right of suit or cause of action may exist, there must be in existence a person capable of suing and another capable of being sued. Until both these persons exist, there cannot be a perfect cause of action—*Darby and Bosanquet on Limitation*, 2nd Edn., pp. 49, 50. There can be no limitation until there is a person in existence competent to sue—*Seeti Kutti v. Kunhi Pathumma*, 40 Mad. 1040 (1063); *Manikkam v. Thanikachellam*, 4 L.W. 369, 34 I.C. 945; *Palaniandi v. Vadamalai*, 2 L.W. 723, 28 I.C. 956. Therefore where no trustee was appointed for a temple by the committee for 24 years from 1883 to 1907, and the defendant had been in adverse possession of the office of trustee before 1907, the adverse possession by the defendant commenced only from 1907, the year in which the plaintiff was appointed to the office of trustee—*Palaniappa v. Vadamalai*, 18 I.C. 373. On the same principle, so long as there was no Receiver appointed for the management of a temple, there was none competent to sue on behalf of the temple, and the right to sue accrued to the temple from the time when the plaintiff was appointed Receiver—*Annamalai v. Gobinda Rao*, 46 Mad 579. In a suit by a legal representative of the principal against the agent, time would not run until there was a legal representative of the principal constituted—*Murray v. East India Co.*, (1821) 5 B. & A. 204.

167. 'Before the right accrues .—To bring this section into operation, the death must occur *before* the right to sue or make an application accrues. If the right accrues in the life-time of the deceased, the period of limitation begins to run from the date of accrual, and it matters not, as far as limitation is concerned in that case, whether by a will proved or by any other means a legal representative comes into existence or not—*Rhodes v. Smeethurst*, 4 M. & W. 42; *Boatwright v. Boatwright*, L.R. 17 Eq. 71.' See section 9.

168. Capable of suing :—The expression '*capable of suing*' is the equivalent of '*not under legal disability to sue*'. It cannot refer to incapacity arising from want of means or absence or other physical causes. What legal disabilities incapacitate from suing are pointed out in section 6, amongst which infancy is the foremost—*Rivett-Carnac v. Goculdas*, 20 Bom. 15 (at p. 44).

Section 6 of the Limitation Act must be read in conjunction with this section; and the operation of the earlier section must be regarded as qualified by and subject to the rule prescribed in the latter section. Thus, where a partner died in 1896 leaving a widow and infant sons,

and the widow took out letters of administration to the deceased's estate. In June 1896, limited during the minority of the sons, and the eldest of the minors who attained majority in 1903 instituted the present suit in 1904 against the surviving partner, on behalf of himself and his infant brothers, for an account and share of the profits of the dissolved partnership, held that their infancy did not save limitation because the effect of the grant of the letters of administration to the widow was that the entire estate of the deceased vested in her, and she represented in every respect the estate of her husband; and therefore time began to run from the date on which the plaintiff's mother obtained letters of administration—*Mohit v. Raj Narain*, 9 C.W.N. 537. It is submitted, however, that this view of the law, which practically modifies the provisions of section 6, is incorrect.

169. Legal representative :—For definition, see C. P. Code, sec. 2 (11).

An executor or administrator of a deceased person is his legal representative for all purposes.—Sec. 211, Indian Succession Act (XXXIX of 1925). The executor is a legal representative within the meaning of this section even though he has not yet taken probate, for the taking of probate is not a condition precedent to the filing of suits but is only necessary before getting a decree. Time therefore begins to run against the executor from the date of the testator's death—*Balakrishnaudu v. Narayanasawmy*, 37 Mad. 175, 24 I C. 852.

The executor of a will is a legal representative capable of instituting a suit from the date of the testator's death and not from the date when he obtains probate. The title and authority of the executor are derived from the will and not from the probate. An administrator on the other hand derives his title solely under his grant, and cannot sue before he gets his letters of administration—*Meyappa Chetty v. Subbramaniam Chetty*, 20 C.W.N. 835 (P.C.), 35 I C. 323. A certificate of administration under Bombay Reg. VIII of 1827 only confers a right of management and does not constitute the holder of such certificate the representative of the estate for the purpose of distributing it among the co-sharers; consequently he is not a person against whom a sharer can institute a suit for his share—*Keshav v. Narayan*, 14 Bom. 236. The person in possession of the estate of a deceased Hindu must, till some other claimant (e.g., under a will of which no probate has been granted) comes forward, be treated for some purposes as his representative—*Prosunno v. Krishto*, 4 Cal. 342. Where, after the death of one of the partners in a partnership business, the Administrator-General obtained letters of administration and instituted a suit on behalf of the infant heir of the deceased partner for partnership-accounts and recovery of assets, it was held that the Administrator-General must be treated as the legal representative, and the period of limitation as regards the suit would run from the date of the issue of the letters of administration and not before—*Bhagwandas v. Rivett-Carnac*, 23 Bom. 541 (P.C.), affirming 20 Bom. 15. In a suit for an account accruing

to the employer on the death of his manager, against the manager's representatives, limitation will not commence to run until administration has been taken out to such manager's estate—*Lawless v. Calcutta Landing and Shipping Co*, 7 Cal. 627.

Sub-sec. (3) :—The third sub-section provides that the rule of this section shall not apply to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office, because the application of the rule to such cases would tend to create insecurity of title—*Kesho Prasad v. Madho Prasad*, 3 Pat. 880, A.I.R. 1924 Pat. 721, 83 I.C. 812

18. Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him,
the time limited for instituting a suit or making an application—

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

The principle is that the right of a party defrauded cannot be affected by lapse of time or by anything else done or omitted to be done by him, so long as he remains, without any fault of his own, in ignorance of the fraud which has been committed—*Rolfe v. Gregory*, 4 DeG. J. & S. 576 (579), Darby and Bosanquet, 2nd Edn, pp 261, 262.

169A. Scope :—The provisions of this section do not apply to criminal cases; a complaint of a criminal offence is not a 'suit' or an 'application'—*Empress v Nageshappa*, 20 Bom 543

170. Fraud —In order to constitute fraud, it is not sufficient that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title while the rightful owner is ignorant of his claims; there must be some abuse of a confidential position, some intentional imposition or some deliberate concealment of facts—*Dean v. Thwaite*, (1855) 21 Beav. 621; Darby and Bosanquet,

p. 193. Mere non-disclosure of a transaction does not amount to 'fraud.' This term means *active* deceit in defrauding or endeavouring to defraud a person of his rights by artful device or concealment of fact—*Ghulam Raza v. Sardar Khan*, 4 P L R 1903, 86 P.R. 1902; *Gauhri Mal v. Jainti Mal*, 73 P.R. 1885; *Ghisa v. Hayat*, 120 P.R. 1883; *Arsala v. Yar Muhammad*, 32 P.R. 1881.

If the defendant, by reason of the relation in which he stands to the plaintiff or otherwise, is bound to give him certain information, the withholding of such information, though not an active concealment, may amount to fraudulent concealment. *Brown*, 505, 506. See also 52 Cal. 62 cited under Note 171 below.

This section applies only to such fraud as amounts to *concealment* and is intended to keep from the injured party the knowledge of the wrong or its remedy. This section therefore can have no application where the fraud alleged by the party applying to set aside an execution sale is mere under-statement of the value of the properties in the sale proclamation—*Rai Kishori v. Mukund*, 15 C.W.N. 965 (969), 11 I.C. 295; *Narayan v. Damodar*, 16 C.W.N. 894, 16 I.C. 464 A mere mis-statement of the value of the property in the sale proclamation is not necessarily a fraudulent act. But a wilful mis-statement by a decree-holder in the sale-proclamation of the value of the property may be sufficient evidence, in particular cases, to justify an inference of fraud—*Ramdhari v. Deonandan*, 2 Pat. 65, 77 I.C. 957, A.I.R. 1922 Pat 507. Where the defendant wrongfully collected the money due to the plaintiff, and not only did he not inform the plaintiff of it but even brought a false suit to cover his tricks, *held* that there was fraudulent concealment which brought this section into operation, and in a suit brought by the plaintiff to recover the moneys, time did not run until he was aware of those collections—*Sahib Ram v. Govindi*, 43 All. 440.

The fraud contemplated in this section is the fraud committed by the party against whom a right is sought to be enforced, *i.e.*, the fraud of the defendant or some person through whom he derives his title; it does not mean the fraud of a third person—*Ramdoyal v. Ajoodhia*, 2 Cal 1; *McCallum v. McCallum*, [1901] 1 Ch. 143. If it is alleged that the fraud was committed by the servant or agent of the defendant, it must be shown that it was committed for the general or special benefit of the principal and not for the private purposes of the servant or agent—*British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q.B.D. 714.

"Kept from the knowledge of such right".—The section applies only when the plaintiff has been kept from the *knowledge* of his right to do a certain thing by fraud of the other party, and not where he is so kept from *exercising* his right—*Golam Muzafar v. Golok*, 25 I.C. 884. Unless the knowledge of his right was fraudulently concealed from him, this section has no application—*Ramdhari v. Deonandan*, 2 Pat. 65, A.I.R. 1922 Pat. 507. The *knowledge* of a right and the *exercise* thereof are fundamentally different things. Where a judgment-debtor paid the amount of decree out of Court but the decree-holder

did not certify the payment under O. 21, rule 2, C. P. Code, and consequently the judgment-debtor was kept from the *exercise* of his right to make an application under O. 21, rule 2 (2), this section did not apply, because it could not be said that the judgment-debtor was kept from the *knowledge* of his right to make the application—*Buroo v. Jamurat*, 16 C.W.N. 923 (927), 16 C.L.J. 174, 13 I.C. 63. Where it was alleged that the decree-holders had fraudulently kept the judgment-debtor from exercising his right to apply to the Court to certify an adjustment under O. 21, r. 2, by giving him assurances, no extension of time was granted—*Chetty Firm v. Lon Pow*, 1 Bur. L.J. 226, 68 I.C. 924, A.I.R. 1923 Rang. 103.

The mere act of fraud is immaterial. In order to avail himself of the benefit of this section, the plaintiff or applicant must show that he has by means of the fraud been kept from the knowledge of his right to institute a suit or make an application—*Asanand v. Jhangi*, 29 P.L.R. 1919, 50 I.C. 610; *Nand Ram v. Ishar*, 27 P.L.R. 24, 92 I.C. 597; *Jatindra v. Brojendra*, 19 C.W.N. 553; *Biman Chandra v. Promotho*, 49 Cal 886 (891); *Bowrammah v. Chettiar*, 7 Rang. 104, A.I.R. 1929 Rang. 62 (63), 117 I.C. 63; *Das Narayan v. Mir Mahammad*, 6 P.L.J. 319 (323), 61 I.C. 823; *Payidanna v. Lakshminarasamma*, 38 Mad. 1076 (1086); *Ramchandra v. Hardeo*, 20 N.L.R. 23, A.I.R. 1924 Nag. 94. Thus, in an application to set aside a sale on the ground of fraud, the applicant will have to prove that his right to set aside the sale has been kept concealed from his knowledge by the fraud of the decree-holder or auction-purchaser; it is not enough for him to shew that the execution-proceedings were irregular and fraudulent—*Kailash v. Bissonath*, 1 C.W.N. 67; *Narayan v. Mohanth Damodar*, 16 C.W.N. 894, 16 I.C. 464; *Bajrang v. Sonejhar*, 6 P.L.T. 567, 85 I.C. 622, A.I.R. 1925 Pat. 521; *Nabin Chandra v. Bipin Chandra*, A.I.R. 1926 Cal. 229, 87 I.C. 555.

The mere ignorance of the plaintiff as to his right to sue is no excuse under this section. It is only where such ignorance has been brought about by the fraud of the other party that this section applies—*Lokenath v. Chintamani*, 16 I.C. 547. Thus, where an application to set aside a sale on the ground of fraud is made beyond the period of limitation, it is incumbent on the applicant to show that not only had he no knowledge of the sale but that he was kept from that knowledge in the manner and by the act of the person specified in this section—*Purna v. Anukul*, 36 Cal 654 (657, 658).

On the other hand, if it is proved that the plaintiff was fully aware of his right, inspite of the fraud practised upon him, he is not entitled to the benefit of this section, in as much as he was not kept from the knowledge of his right—*Jotindra v. Brojendra*, 19 C.W.N. 553, 24 I.C. 249.

Where the judgment-debtor had been fraudulently kept from the *knowledge of the sale*, he was necessarily kept from the *knowledge of the right* to have the sale set aside, and section 18 would apply—*Jotindra v. Brojendra*, (supra).

171. Evidence—Burden of proof :—Fraud must be proved as laid. When one kind of fraud has been charged, another kind

of fraud cannot, on failure of proof, be substituted for it—*Abdool v. Turner*, 11 Bom. 620 (P.C.). The fraud must be proved by the person alleging it. It is for the plaintiff to give in the first instance clear proof of the fraud alleged by him. The Court will not presume it from the mere existence of suspicious circumstances—*Bhagwan v. Ida*, 1903 P.L.R. 27; *Biman Chandra v. Promotha*, 49 Cal. 886, 36 C.L.J. 295, 68 I.C. 94; *Ramesh Chandra v. Birajasundari*, 32 C.W.N. 519 (522).

Where fraud is charged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the *particulars* of the fraud which he alleges; general allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud—*Wallingford v. Mutual Society*, 5 App. Cas. 685 (per Lord Selbourne); *Gunga v. Tiluckram*, 15 Cal 533 (P.C.); *Chenvirapa v. Danava*, 19 Bom. 593 (601); *Krishnaji v. Wamanaji*, 18 Bom. 144. The allegations must be specified in particulars and detail, and the *finding* of the Court ought to be precise as to the particular acts and intentions constituting the fraud—*Nihal Chand v. Faujdar*, 3 P.R. 1882; *Ghulam Raza v. Sardar Khan*, 86 P.R. 1902. It is not necessary for the Court to state in so many words that it was due to the fraud of the decree-holders that the judgment-debtors were kept out of the knowledge of the sale; if the Judge discusses the evidence and comes to the conclusion that there was a suppression of the writs of attachment and sale proclamation and other processes of execution, and that the judgment-debtor had no knowledge of the sale until there was delivery of possession to the auction-purchaser, it amounts to saying that the judgment-debtor was kept out of the knowledge of the sale by the fraud of the decree-holder—*Ramesh Chandra v. Birajasundari*, 32 C.W.N. 519 (521), 108 I.C. 33, A.I.R. 1928 Cal. 349. Where the judgment-debtor applies to have the execution sale set aside on the ground of fraud, and seeks to take advantage of this section, the Court is bound to find when and how the fraud was committed and as to whether the judgment-debtor was kept from the knowledge of the execution-proceedings and sale. There must be a distinct allegation of fraud in the petition, and the party relying upon fraud must state *seriatim* and in detail the facts constituting the fraud, vague or general allegations of fraud being of no avail. He must state further as to how the fraud was practised, how he was kept out of the knowledge of the execution proceedings and the sale, and how he came to know of the sale—*Das Narayan v. Mir Mahammad*, 6 P.L.J. 319 (323), 2 P.L.T. 401. He must also prove that the other party was himself guilty of the fraud or was an accessory thereto—*Purna v. Anukul*, 36 Cal. 654 (657).

Where the allegations in the plaint do not of themselves necessarily imply fraud on the part of the defendant, nor suggest any such imputation, sec. 18 would have no application. On the other hand, if the facts stated in the plaint necessarily suggest fraud on the part of the defendant, the mere omission in the plaint to expressly stigmatise the defendant's conduct as fraudulent would be no bar to the plaintiff's relying on the

provisions of this section—*Radha Kishen v. Delhi Cloth Mills*, 32 P.R. 1913, 16 I.C. 804.

When once the fraud has been established by the plaintiff, the burden is shifted on to the other side, and it is for the defendant who sets up limitation to show that the plaintiff had had clear knowledge of the facts constituting the fraud at a time which is too remote to allow him to bring the suit—*Rahimbhoy v. Turner*, 17 Bom. 341 (P.C.); *Basiruddin v. Sonaula*, 6 I.C. 154; *Arjun v. Gunendra*, 18 C.W.N. 1266; *Ramesh Chandra v. Brajasundari*, 32 C.W.N. 519 (522), A.I.R. 1928 Cal. 349; *Ram Kinkar v. Sthiti Ram*, 27 C.L.J. 528; *Bhushan Moni v. Profulla*, 48 Cal. 119 (123); *Vithappa v. Basgowda*, 14 Bom.L.R. 771, 17 I.C. 10; *Abdul Rahim v. Muhammad Yar*, 12 P.R. 1898; *Gordhan Das v. Ahmed*, 34 P.R. 1904; *Biman Chandra v. Promotha*, 49 Cal. 886, 36 C.L.J. 295, A.I.R. 1922 Cal. 157; *Ram Chandra v. Hardeo*, 20 N.L.R. 23, A.I.R. 1924 Nag. 94. In an application to set aside a sale, if it is obvious that a fraud has been perpetrated on the judgment-debtor, it is for the decree-holder to establish at what precise point of time the judgment-debtor had clear and definite knowledge of those facts which would entitle him to apply for setting aside the sale—*Babu Lal v. Parem Kumari*, 10 P.L.T. 231, A.I.R. 1929 Pat. 228 (229), 117 I.C. 46. Where the plaintiff alleges fraud and states that he acquired knowledge on a particular date, in ordinary cases the initial burden would be on him to lead evidence establishing the date of his knowledge; but if notwithstanding the fact that the plaintiff did in most specific terms allege in his suit the date and the circumstances in which he acquired knowledge for the first time, the defendant's pleadings are evasive and do not raise specifically an issue as to the date of the plaintiff's acquisition of knowledge, the burden of proving the date is not on the plaintiff—*Sri Kishan v. Ghananand*, 27 A.L.J. 1153, A.I.R. 1929 All. 721 (723).

In 1914, the father of a minor obtained a decree, and died before execution; in September 1915 the judgment-debtor got himself appointed as guardian of the minor's property, but in June 1921 was replaced by the minor's mother, who then applied in August 1921 to execute the decree against the judgment-debtor. The latter pleaded limitation. Held that the judgment-debtor who got himself appointed as guardian was under the obligation of enforcing against himself the decree which had been obtained against him, and the burden lay heavily upon him to show that he had made a full disclosure to the Court of his indebtedness to the estate; otherwise the Court would assume that no such disclosure was made and that he perpetrated a fraud both on the Court and on the minor by not making the disclosure. The judgment-debtor could not rely on his own fraud, and the period between September 1915 and June 1921 must be excluded from computation in calculating the period of limitation; the decree was not therefore time-barred—*Gobinda Lal v. Nalini Kanta*, 52 Cal. 63, 88 I.C. 61, A.I.R. 1925 Cal. 584.

172. Application to set aside sale:—In a case to set aside a sale on the ground of fraud, under O. 21, r. 90, C. P. Code, the applicant must have knowledge not merely of the factum of sale, but

a clear and definite knowledge of the facts which constitute the fraud, before time can run against him—*Bhusan Moni v. Profulla*, 48 Cal. 119 (122). Where irregularities affecting the validity of a sale have, by the fraud of the judgment-creditor or other parties to the sale, been kept concealed from the judgment-debtor, he is entitled to make an application under section 311 C. P. Code 1882 (O XXI r. 90); limitation (Art. 166) will be counted from the time when the fraud first became known to the applicant, and it is immaterial that the sale was confirmed. The confirmation of the sale ought not to be used as a shield for the fraud by which the Court has been induced to make the sale itself—*Mahendra v. Gopal*, 17 Cal 769 (F.B.) (overruling *Gobinda v. Umacharan*, 14 Cal 679); *Golam Ahmed v. Judhustur*, 30 Cal 142 (153); *Sheo Ram v. Ikramunnissa*, 45 All. 316, 21 A L J. 176, 71 I.C. 631, A I R 1923 All. 282

Where execution-proceedings having been started against a judgment debtor, who had died long ago, writs of attachment and proclamation of sale were issued in his name and returns were filed that the processes were duly served upon the judgment-debtor, and thereafter the sale took place, it was held that the application to set aside the sale (Art. 166) was within time if instituted within one month from the date of the applicant's knowledge of the fraud—*Arjun v. Gunendra*, 18 C.W.N. 1266 (1270), 20 C.L.J. 341, 27 I.C. 294. Where every process issued by the Court to apprise the judgment-debtors or their representatives that execution was to proceed against them, had been fraudulently suppressed, held that this section applied to the case—*Ram Kinkar v. Sthiti Ram*, 27 C.L.J. 528, 46 I.C. 221; *Jatindra v. Brojendra*, 19 C.W.N. 553, 24 I.C. 249.

But there is all the difference in the world between a failure to serve the notices and a deliberate contrivance on the part of a party to suppress the notices. The one is due to negligence, carelessness or various other circumstances; the other is the result of a deliberate contrivance on the part of a party for his own advantage. Mere negligence or carelessness on the part of the process-server or the identifier is insufficient as a basis for a finding of fraud—*Behari Lal v. Tanuk Lal*, A I R. 1926 Pat 397, 8 P.L.T. 28, 97 I.C. 798

Fraud antecedent and subsequent to sale :—It is not necessary to prove fraud subsequent to the sale—*Jotindra v. Brojendra*, 19 C.W.N. 553, 24 I.C. 249. It is not necessary to prove that after the sale, when the right to apply for setting aside the sale accrued, there was some fraud practised by the decree-holder which kept his right to apply concealed from him. It is sufficient if fraud antecedent to the sale is proved. Therefore, if owing to the fraudulent suppression of the processes by the decree-holder, all knowledge of the execution proceedings up to the date of the sale was withheld from the petitioner, then so long as he did not come to know of the sale, the effect of the fraud continued, and the conclusion is that he was kept from the knowledge of the sale in consequence of the initial fraud practised by the decree-holder—*Sarvi Begam v. Ramchandra*, 47 All. 850, 23 A.L.J. 760, A.I.R. 1925 All. 778,

88 I C. 500; *Bhusan Moni v. Profulla*, 48 Cal. 119 (122); *Nabin Chandra v. Bipin Chandra*, 87 I.C. 555, A.I.R. 1926 Cal. 229. In two cases the Calcutta High Court has held that this section does not apply where the fraud is *antecedent* to the accrual of the right—*Raikishori v. Mukunda*, 15 C.W.N. 965 (970); *Purna Chandra v. Anukul*, 36 Cal. 654 (657). But in later cases it has been held that, fraud *antecedent* to the sale cannot be excluded from consideration. It is a saying of an old Chancellor that frost and fraud end in foul, and in this lies the truth of the matter. Fraud is a *continuing* influence and until that influence ends, it retains its power of mischief—per Jenkins C. J. in *Narayan v. Mohanth Narayan*, 16 C.W.N. 894, 16 I C 464 (dissenting from *Purna Chandra v. Anukul*, 36 Cal. 654 (657); *Bajrang v. Sonejhar*, 6 P.L.T. 567, A.I.R. 1925 Pat 521. The question of fraud should be considered as a whole. The proof of fraud antecedent to the sale may have an important bearing on the determination of the question whether there was fraud subsequent to the sale, although it cannot be laid down as an inflexible rule that proof of fraud antecedent to the sale necessarily indicates continuance of that fraud up to a period subsequent to the sale—*Tookoomani v. Dwarka*, 17 C.W.N. 478, 17 I C. 972.

173. Necessary document :—In one sense every document may be said to be necessary, but a limit should be placed on the meaning of the term, and a document which is merely useful in evidence cannot be considered a necessary document—*Lakshminarasu v. Ankinid*, 7 M H. C.R. 22 (24).

Concealment of document :—The fact that a document which is alleged to have been fraudulently concealed has been registered would seem to displace the allegation of concealment—*Venkateswara v. Shekhari*, 3 Mad. 384 (398) P C. So too does the production of the document before a public officer or in a Court in support of a claim—*Ibid* (at p. 399), *Ghiba v. Hayat*, 120 P R 1883.

174. Starting point of limitation :—“*When the fraud became known*” :—In case of a suit or application, limitation runs from the date when the fraud becomes known to the plaintiff or applicant. (In England, however, statute runs not from the date of discovery of the fraud but from the date when the plaintiff would have discovered it, if he had used due diligence. Lightwood, p. 297)

To bring his case within this section, the plaintiff must allege when the fraud pleaded came to his knowledge—*Rai Radha Krishna v. Bisheshwar*, 1 Pat 733 (P.C.), 67 I.C. 914, A I R 1922 P C 336. When the true nature of his rights was not discovered by the plaintiff earlier than the time at which his demand for possession was resisted, limitation began to run from the date of resistance—*Harnath v. Indar Bahadur*, 26 O C. 223 (P.C.), 27 C.W.N. 949, 71 I.C. 629, A I.R. 1922 P.C. 403.

The knowledge required by this section is not mere suspicion. It must be knowledge of such a character as will enable the person defrauded to seek his remedy in Court—*Natha v. Jodha*, 6 All. 406. Hearsay

knowledge is not the kind of knowledge contemplated by this section—*Bhusan Moni v. Profulla*, 48 Cal. 119 (123) Such knowledge must be a clear and definite knowledge of the facts constituting the particular fraud. The mere fact that some hints and clues reached the injured party which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud, is not enough to constitute clear and definite knowledge of it—*Rahimbhoy v. Turner*, 17 Bom. 341 (P.C.); *Biman Chandra v. Promotha*, 49 Cal. 886, 36 C.L.J. 295; *Ramchandra v. Hardeo*, 20 N.L.R. 23, A.I.R. 1924 Nag. 94.

In suits for money misappropriated by an agent employed for the collection of rents, where fraudulent accounts have been rendered by the agent, the Court having regard to the nature of the fraud, the facility with which it may be known, and the likelihood of the attention being called to it, may infer such knowledge and may infer the time when the means of knowledge first came within the plaintiff's reach, or in other words, may hold the plaintiff fixed with constructive knowledge of the fraud—*Nilmoni v. Nilu Nath*, 20 Cal. 425.

174A. Protection of bona fide purchaser—Before a person can obtain the benefit of this section he must show (1) that he is a purchaser according to the proper meaning of the term, (2) that he is a purchaser *bona fide* and (3) that he is a purchaser for valuable consideration—*Radhanath v. Gisborne*, 15 W.R. 24 (27) (P.C.) The property of which the plaintiff has been deprived by fraud can hardly be said to have been purchased in good faith from the person guilty of fraud, if the circumstances of the case are such as should put an ordinary careful man upon an inquiry and consideration as to the infirmity of the vendor's title, or such as should call attention of the purchaser to such infirmity of title—*Ibid* (at p. 29).

175. Application of section to special or local laws :—Under section 29 as now amended, this section will be applied in computing the period of limitation prescribed by any special or local law. The decision in *Radha Shyam v. Dinabandhu*, 18 C.W.N. 31 to the effect that section 18 of the Limitation Act has no application to a proceeding under the Bengal Tenancy, is no longer good law.

19. (1) Where before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledg-

ment is undated, oral evidence may be given of the time when it was signed ; but, subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.

Explanation I.—For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation II.—For the purposes of this section, “signed” means signed either personally or by an agent duly authorized in this behalf.

Explanation III.—For the purposes of this section an application for the execution of a decree or order is an application in respect of a right.

176. Before expiration of period—The acknowledgment must be made *before the expiration* of the period. An acknowledgment given more than sixty years after the date of the mortgage is insufficient to keep the mortgage alive—*Indurai v Shivalal*, 27 Bom L R 467, A I R 1925 Bom 339, 87 I C 699. Where a series of acknowledgments have been made, each within the new period arising from the previous acknowledgment, and the first is within three years of the date of the debt, the debt is kept alive—*Mohesh Lal v. Busuntu Kumaree*, 6 Cal 340.

Acknowledgment made during holidays—An acknowledgment made during holidays but *after the expiry* of the period of limitation prescribed for the suit will not give a new period under this section, as this section requires that the acknowledgment should be given before the expiry of the prescribed period; and the fact that the right to sue was subsisting under sec. 4 on the date of the acknowledgment owing to the intervention of the vacation would be of no avail. The word ‘prescribed’ means prescribed by the schedule and not prescribed by the operation of sec 4—*Bai Hemkore v. Masamali*, 26 Bom 782 (784), *Nandram v Ranchhodas*, 19 N.L.R. 135, 5 N.L.J. 178, A I R. 1922 Nag 250. But the Allahabad High Court is of opinion that there is no reason to limit the sense of the expression ‘period prescribed’ to the period prescribed in the schedule alone, but that the expression means the period prescribed by law, that is, the period prescribed by the whole body of the Limitation Act; in other words, the period prescribed by the schedule read with section 4.

Therefore, an acknowledgment made after the expiry of the period of limitation but during the holidays is a good acknowledgment—*Abdul Ghani v. Chiranjil Lal*, 49 All. 726, 102 I.C. 111, A.I.R. 1927 All. 577 (dissenting from 26 Bom 782). The same view has been expressed (by way of obiter) in *Visram v. Tabaji*, 15 Bom. L.R. 348, 19 I.C. 820 (821) (disapproving 26 Bom 782). Recently the Nagpur Court also dissents from the Bombay case and holds that an acknowledgment made during the holidays is valid—*Jhanaklal v. Gulabchand*, 11 N.L.J. 87, A.I.R. 1928 Nag. 192.

Acknowledgment made within period of grace—A mortgage is kept alive by an acknowledgment of liability made by the mortgagor within the period of grace allowed by section 31 though after the expiry of 12 years prescribed by Art. 132—*Sheo Parlab v. Tajammal*, 49 All. 67, A.I.R. 1927 All. 114, 93 I.C. 1005, *Moti Begam v. Har Prasad*, 11 A.L.J. 570, 19 I.C. 658. Sec. 31 has now been repealed.

Acknowledgment during extended period under sec. 6—The Bombay High Court holds that the "period prescribed" means the period prescribed in the third column of the schedule, and not the period extended to a minor by operation of sec. 6. Therefore, the acknowledgment must be given before the expiration of the period prescribed in the schedule, and not before the expiration of the extended period within which a minor may bring a suit after his disability has ceased—*Maganalal v. Amichand*, 52 Bom. 521, 30 Bom. L.R. 733, A.I.R. 1928 Bom. 319 (320), 112 I.C. 24 (following 26 Bom. 782).

Acknowledgment of barred debt—Promise to pay—An acknowledgment gives a fresh period of limitation in respect of such debts as are not already barred at the time when the acknowledgment is made. An acknowledgment of a barred debt cannot give a fresh period of limitation in favour of the creditors—*Deoraj v. Indrasan*, 8 Pat. 706, A.I.R. 1929 Pat. 258 (260), 123 I.C. 470, 10 P.L.T. 169; *Saraj Prasad v. Bourcke*, 5 P.L.J. 371, 1 P.L.T. 190, 56 I.C. 379; *Mutsuddi v. B. B. & C. I. Ry.*, 42 All. 390; *Bindal v. Chota*, 16 C.W.N. 636, 14 I.C. 133. In case of an acknowledgment of a barred debt, which amounts to creation of a new contract under sec. 25 (3) of the Contract Act, there must be an express promise to pay, otherwise the acknowledgment is insufficient to create a contract—*Ram Bahadur v. Damodar*, 6 P.L.J. 121, 60 I.C. 514, A.I.R. 1921 Pat. 29; *Maganalal v. Amichand*, 52 Bom. 521, A.I.R. 1928 Bom. 319 (322); *Gobind v. Sarja*, 30 All. 268. If a debt is time-barred, there can be no acknowledgment of the debt; there can only be a promise to pay that sum. Such a promise to pay would amount to a new contract. It is open to the borrower to make a promise in writing, signed by himself, to pay a debt of which his creditor might have enforced payment but for the law for the limitation of the suit. This is recognised by sec. 25 (3) of the Contract Act—*Guljar v. Sariman*, 36 C.L.J. 228, A.I.R. 1923 Cal. 71; *Md. Abid Hussain v. Bhagavan Das*, 5 I.C. 418 (All); *Vasudev v. Ramakrishna*, 24 Bom. 394; *Mali v. Baikantha*, 18 C.L.J. 269; *Bhowani v. Peari*, 18 C.L.J. 329.

Under the English law, an acknowledgment of a debt implies a promise to pay even a barred debt. But in India, an acknowledgment in which there is no express promise implying a new contract to pay, must be made before the debt is barred by time, and in this respect an acknowledgment under sec. 19 Limitation Act differs from a promise to pay a barred debt under sec. 25 (3) Contract Act. Where, however, the acknowledgment is not merely an admission of an existing debt, but there are words from which a clear promise to pay is made out, such as fixing the date of payment and so on, such an acknowledgment would come under sec. 25 (3) Contract Act and not only under sec. 19 Limitation Act—*Deoraj v. Indrasan*, 8 Pat 706, A.I.R. 1929 Pat. 258 (261), 120 I.C. 470.

177. Acknowledgment :—Acknowledgment means a definite admission of liability; it is not necessary that there should be a *promise to pay*; the simple admission of a debt is sufficient—*Binode Behari v. Raj Narain*, 30 Cal. 699; *Subramania v. Veerabhadra*, A.I.R. 1921 Mad. 464, 41 M.L.J. 217; *Peri Ramasami v. Chandra Kalayya*, 48 Mad. 693, 47 M.L.J. 840; *Ibrahim v. Lalit Mohan*, 50 Cal. 974 (975), 28 C.W.N. 322; *Nand Lal v. Partab Singh*, 3 Lah. 326, 69 I.C. 502, A.I.R. 1922 Lah. 425. In this respect the Indian law differs from the English law. In England, an acknowledgment of a claim can keep it alive if the acknowledgment amounts to a promise to pay—*Tanner v. Smart*, (1827) 6 B. & C. 603; *Lightwood*, p. 339, so that the requirements of English law are more stringent than those of Indian law. See *Maniram v. Seth Rupchand*, 33 Cal. 1047 (1060) (P.C.). Where the right claimed is a debt, it is necessary that an unequivocal and unqualified admission of the debt or of the subsisting relationship of debtor and creditor should be established, though a promise to pay need not be made out—*Binode v. Rajnarain*, 30 Cal. 699. A promise to pay is required in case of a barred debt. See preceding note.

Under this section, an acknowledgment is not limited in respect of a debt only, it may be in respect of "*any property or right*" which is the subject-matter of the suit (e.g. the taking of accounts of a dissolved partnership)—*Hukumat v. Nenmal*, 22 S.L.R. 117, A.I.R. 1928 Sind 45.

A document in which the mortgagee merely acknowledged having received possession of the mortgaged land would not constitute an acknowledgment of liability, in respect of the mortgagor's right to redeem the land, which would give him a fresh period for bringing a suit for redemption; for there cannot really be an acknowledgment without knowledge that the party is *admitting anything*. Sec. 19 intends a *distinct* acknowledgment of an existing liability—*Dharma v. Govind*, 8 Bom. 99. A document containing a mere description of the property without any admission of a liability does not amount to an acknowledgment—*Khiali Ram v. Taik Ram*, 38 All. 540 (550). Similarly, where the plaintiff consigned some bags to be delivered to the consignee but they were not delivered, and the Railway Company wrote a letter to the plaintiff informing him that the bags were lying at a certain place and that the

plaintiff might take delivery if he liked, *held* that the letter did amount to an acknowledgment of liability in respect of those bills—*Mutsaddi Lal v. B. B. & C. I. Ry. Co.*, 42 All. 390 (393).

The acknowledgment must be an acknowledgment of a liability, admission by the defendant in a previous suit (not between these parties) that he had previously executed a promissory note in favour of the plaintiff is merely an admission of the fact of the execution of the note and does not amount to an acknowledgment of liability under the note—*Lallu v. Reoti Ram*, 45 All. 679, 21 A.L.J. 669, 74 I.C. 353, A.I.R. 1924 All.

The acknowledgment must be an acknowledgment of an existing liability—*Ram Khelwan v. Nanhoo*, 6 C.L.J. 544, *Rangasami Thangavelu*, 42 Mad. 637; *Kandasami v. Suppammal*, 45 Mad. 443 (447), 42 M.L.J. 209, 70 I.C. 576, A.I.R. 1922 Mad. 104, 70 I.C. 576. It must be an acknowledgment of the debt as such and must involve an admission of a subsisting relationship of debtor and creditor, and an intention to continue it until it is lawfully determined must also be evident—*Ven v. Parthasarathi*, 16 Mad. 220, *Hukumat v. Nennumal*, 22 S.L.R. 45, A.I.R. 1928 Sind. 45. A mere reference to arbitration which is *prima facie* only a mode of settling disputes, and not an admission of liability by the parties, does not import any subsisting legal relationship of debtor and creditor, and therefore does not amount to an acknowledgment—*Ramamurthy v. Gopayya*, 40 Mad. 701 (704). So also an admission of past liability unaccompanied by an allegation of discharge cannot in all cases be interpreted as an admission of a subsisting liability. Each case must be treated on its own merits, and from the language used and the circumstances in which the acknowledgment is made it must be decided whether it amounts to an implied acknowledgment of a subsisting liability—*Kandasami v. Suppammal*, 45 Mad. 443 (447), 42 M.L.J. 209, A.I.R. 1922 Mad. 104, 70 I.C. 576. A mere statement that a debt existed at one time without anything further is not an acknowledgment of a subsisting liability, even though the person who makes the statement does not go on to say that the liability has ceased. But in each case the Court has to consider the circumstances in which the statement was made, and to see whether it was really intended to convey the impression that the debt was subsisting at the date of the statement or not, and if from the circumstances the Court can infer that the statement was intended to convey the impression that the debt was still subsisting the Court will be justified in holding that it is an acknowledgment of a subsisting liability—*Official Assignee v. Subramania Aiyar*, 46 M.L.J. 1, A.I.R. 1924 Mad. 286, 77 I.C. 740.

In a suit to recover a sum of money the plaintiff relied upon a letter written by the defendant to this effect:—"I wish to look to your account in my own account I do not see any amount due to you. Please therefore send the account." It was held that there was no acknowledgment, there was no admission of the existence of a debt. Under section 19 the right acknowledged must be of the same description as the right which is the subject of the suit. Thus, in a suit for the balance of

upon taking accounts, an admission that accounts must be taken and settled would be a pertinent acknowledgment, but it might be otherwise in a suit brought to recover a definite sum of money. So also, the asking for an account in response to a creditor's demand may be a very different thing from acknowledging the necessity of settling accounts when a creditor bases his right upon accounts—*Andiappa v. Alasinga Naidu*, 36 Mad. 68 (70). Where the suit is framed as a suit for a definite sum of money, but is really a suit for an amount due on accounts, an admission that accounts must be taken and settled is a good acknowledgment—*Kumaraswamy v. Narayan Rao*, 46 M.L.J. 468, A.I.R. 1924 Mad. 619, 80 I.C. 355.

Where the admission was in the following terms: "I am ashamed that the account has stood so long," it was held to be a good acknowledgment—*Cornford v. Smithard*, (1859) 5 H. & N. 13, *Holmes v. Mackrell*, (1858) 3 C.B. (N.S.) 789. Where the defendant (i.e., the debtor) himself first wrote to the plaintiff requesting him to send in his account made up to Christmas last, and not having received any reply to his first note, he wrote the plaintiff again requesting him to send in his account, it was held that there was a sufficient admission of a debt—*Quincey v. Sharpe*, (1875) 1 Ex. D. 72. Where by a letter the writer definitely asked the plaintiff to send a copy of the account showing that amount was due by him to the plaintiff, held that it was clearly an acknowledgment—*Kirpa Ram v. Devi Dayal*, 28 P.L.R. 169, 101 I.C. 544, A.I.R. 1927 Lah. 832. Where the defendant admitted the existence of a running account between the parties and went on to say that his representatives would compare accounts and pay what was found to be due, held that the words were clear admission of liability—*Sant Lal v. Beni Prasad*, 23 A.L.J. 248, 87 I.C. 985, A.I.R. 1925 All. 340; *Joharmal v. Hiratal*, 7 Pat. 238, A.I.R. 1928 Pat. 221, 107 I.C. 533.

A letter written by a railway company to the plaintiff informing the latter that the goods have been rightly delivered to a third person under an indemnity bond, and that the plaintiff's claim cannot be entertained is not an acknowledgment of liability, but on the contrary amounts to a denial of liability—*Ludhmal v. Secretary of State*, 13 S.L.R. 1, 51 I.C. 570. An allegation that a debt has been discharged is not an acknowledgment because it is tantamount to a denial of the debt—*Rangasami v. Thangavelu*, 42 Mad. 637, 10 L.W. 533, 50 I.C. 380. Where there was an acknowledgment that there was a mortgage, and there was no express statement that it was discharged, but there was a statement that in order to pay off the debt a sale was effected and that since the date of sale the vendees had been in possession of the property, held that the statement did not constitute an acknowledgment of liability—*Chhaterdhari v. Nasib Singh*, 5 P.L.T. 551, 78 I.C. 919, A.I.R. 1925 Pat. 806. But where the defendant denied that any balance would be due to the plaintiff but admitted that accounts should be taken and that he would be liable if any balance were found due to the plaintiff, it was held that the defendant

had made an acknowledgment of the debt—*Sitayya v. Rangareddi*, Mad. 259 (265).

Where a person admitted in a previous case that he had received Rs. 1,000 as earnest money, but stated that the sum had been more repaid by delivery of cotton to the value of Rs. 3,000, such statement cannot be construed as an admission of a subsisting liability in respect of Rs. 1,000—*Kalu v. Mehru*, 41 P R 1916, 32 I.C. 497. But when debtor wrote a letter to the creditor enclosing a memorandum of account which showed that out of the amount of Rs. 1,654 due to the creditor, debtor had deducted the sum of Rs. 1,489 being a sum due to the debtor from a firm of which the creditor was the manager, and remitted to the creditor Rs. 156 being the balance due, held that the mere fact that debtor stated in the account that he had on that day appropriated a part of the amount due to the creditor in satisfaction of a claim due from a third party did not alter the fact that on the date of the letter the sum of Rs. 1,654 was due from the debtor to the creditor before the alleged appropriation was made; there was therefore an acknowledgment of the whole sum of Rs. 1,654—*Curlender v. Abdul Hamid*, 43 All. 216 (259 I C 941).

The acknowledgment of liability must be an absolutely unconditional one. A letter tantamount to a statement that the writer would see whether any amount was due is not an acknowledgment sufficient to give a fresh start—*Jogeshwar v. Rajnarain*, 31 Cal. 195. A letter saying that the writer will sign after looking into the accounts is no acknowledgment—*Bhairo v. Gajadhar*, 19 C.W.N. 170, 23 I.C. 587.

Where the parties to an *abichalnama* acknowledged that accounts remained unadjusted which the arbitrators had to adjust, and each party agreed that he would pay such amount as might be found due from him on adjustment of accounts, it was held that there was sufficient acknowledgment—*Janardan v. Radhaballabh*, 23 C.W.N. 921, 53 I.C. 898.

Even if the acknowledgment be a conditional one, the condition must be fulfilled in order that such acknowledgment should save limitation—*Maniram v. Seth Rup Chand*, 33 Cal. 1047 (1058) (P.C.); *Arunachella Rangiah Appa*, 29 Mad. 519; *Ramamurthi v. Gopayya*, 40 Mad. 701 (704). The defendant wrote a letter to the effect that if certain arbitrators should decide that he should pay any amount, he would immediately pay. If the arbitrators failed. It was held that the letter would not operate as an acknowledgment—*Ramamurthy v. Gopayya*, 40 Mad. 701 (704); *Narayana Sami v. Gangadhara*, 48 I.C. 89, 37 M.L.J. 353. (Contra—*Hukumal Nenumal*, 22 S L.R. 117, A.I.R. 1928 Sind 45, 48). A mere submission to arbitration containing a promise to pay whatever the arbitrators decide is not available as an acknowledgment if the arbitration proves abortive unless the submission contains an unqualified acknowledgment of the debt—*Halsbury*, Vol. 19, p. 66; *Banning*, p. 45. But where there was reference to arbitration and the arbitrators gave an award, the agreement to refer the matter in dispute to arbitration and the award thereon would

amount to an acknowledgment of the debt—*Phul Singh v. Bhojraj*, 49 All. 801, 102 I.C. 181, A.I.R. 1927 All 488; and the fact that the award was subsequently set aside by the District Judge and by the High Court did not nullify the acknowledgment—See *Sitayya v. Rangareddi*, 10 Mad. 259.

An acknowledgment of liability need not be express; it may be by implication—*Arur Singh v. Partab*, 131 P.R. 1919, 53 I.C. 425; *Subba Rao v. Parasurama*, 34 M.L.J. 551, 46 I.C. 973; *Bhagwan v. Madhav*, 46 Bom. 1000, 24 Bom.L.R. 713, but the implication must be a necessary implication, so that the acknowledgment is clear and unequivocal—*Bibi Saheb v. Sayad Mir Mohamad*, 9 S.L.R. 143, *Fillip & Co. v. Mahomedali*, 13 S.L.R. 183, 55 I.C. 822, *Ralluram v. Budharam*, 17 S.L.R. 324, A.I.R. 1925 Sind 181; *Hukumat v. Nenumal*, 22 S.L.R. 117, A.I.R. 1928 Sind 45. Where a judgment-debtor in an execution proceeding objected to his being arrested because he was a poor man and asked that the warrant of arrest should not be executed until his objection had been decided, held that there was no acknowledgment of a debt within the meaning of this section but a mere objection to the execution of the decree of the manner sought by the decree-holder. An acknowledgment must be a clear one and not be left to sheer inference—*Lachman Das v. Ahmad Hassan*, 39 All. 357. But a petition by the arrested judgment-debtor praying for release and for an order to pay the balance of the decretal amount is an acknowledgment of the judgment-debt—*Vithal v. Gopal*, 5 N.L.R. 8, 1 I.C. 240.

In order to make a binding acknowledgment it is not necessary that the exact sum due should be stated in the acknowledgment, it being sufficient if some debt be acknowledged due—*Colledge v. Horn*, (1825) 3 Bing 119, *Lechmere v. Fletcher*, (1833) 1 Cr. & M. 623. Where the principal sum advanced on a mortgage bond was Rs. 5,700, and on payment of Rs. 1,750 by the mortgagor an endorsement was made by him on the back of the bond in the following terms. "Paid on account of principal as per separate accounts, Rs. 1,750 only," held that the endorsement was a sufficient acknowledgment under this section. Although it did not specify the principal sum due at the time of the endorsement, still the expression 'the principal' must be taken to refer to the principal mentioned in the bond on the back whereof the endorsement was made—*Prasanna v. Niranjan*, 48 Cal. 1046, 26 C.W.N. 213, 64 I.C. 988.

An acknowledgment of liability would be good, even if it is accompanied with a demand of evidence of title. Thus, the tenants wrote to the landlord's attorney: "As we have informed your client, we are quite willing to pay him the rent due under our *mourasi pattah* if he can shew a title to give us a good receipt for it that will satisfy our lawyers. If he is unable to produce a perfect title, we are still willing to pay him the rent on his giving us a substantial indemnity." It was held to be a sufficient acknowledgment of the tenants' liability to pay rent—*Sungu Lal v. Wilson*, 26 Cal. 204.

The acknowledgment must distinctly and definitely relate to the liability in respect of the right claimed—*Benimadhub v. Birbal*, 21 O.C. 151, 46 I.C. 813; it must be a necessary implication from the words used that the person acknowledging was referring to the distinct liability in dispute, and not any liability—*Hingu v. Heramba*, 13 C.L.J. 139, 8 I.C. 81; *Filip & Co. v. Mahomedalli*, 13 S.L.R. 183, 55 I.C. 822, *Gopal Rao v. Harilal*, 9 Bom.L.R. 715, *Bhagwan v. Madhav*, 46 Bom. 1000, 24 Bom L.R. 713, A.I.R. 1922 Bom. 356. A letter sent by the defendant to the plaintiff was as follows.—“I was bound to send Rs. 30 according to my *vaida* (fixed time) but on account of the death of my father I have not been able to fulfil my promise. But now, on his obseques being over, I will positively pay Rs. 30. As to whatever debts may be due by my old man, I am bound to pay the same so long as there is life in me.” It was held that the letter merely contained the personal promise of the writer to pay Rs. 30 and a general admission that he was liable to pay his father’s debt, but it did not acknowledge the existence of any particular debt due to the plaintiff from the defendant’s deceased father—*Madhavrao v. Gulabhai*, 23 Bom. 177. If more than one debt be due to the creditor at the time, the acknowledgment must be such as to identify the particular debt sued on, for oral evidence will not be admissible to establish the identity of the debt—*Beti Maharani v. Collector*, 17 All. 198 (P.C.).

It is not necessary that the creditor should openly assent to an amount acknowledged by his debtor to be due to him; it is sufficient if he relies upon it in the suit he brings, and if between the date of acknowledgment and the time of bringing the suit, the creditor has allowed the acknowledgment to remain uncontradicted and unexplained by his debtor—*Lalji v. Roghoonundun*, 6 Cal. 447 (452).

It is not required that an acknowledgment should specify every legal consequence of the thing acknowledged. A simple acknowledgment by one of two joint-debtors that the original debt was a joint debt is sufficient to keep alive the right of the other to claim contribution—*Sakhamoni v. Ishan Chunder*, 25 Cal. 844 (P.C.) So, where in a suit for the making of accounts of a dissolved partnership the plaintiff relies on an acknowledgment, all that he is required to prove is that the defendant has admitted from time to time the existence of the partnership accounts between the parties and his obligation to settle such accounts. It is not necessary, for the acknowledgment to be operative, that he should go further and state that he was bound to pay any particular sum or such sum as may be found due by him—*Hukumat v. Nenumal*, 22 S.L.R. 117, A.I.R. 1928 Sind 45. The plaintiff shipped 200 cases of oil on the defendant’s steamship from Bombay to Jeddah. On the arrival of the steamship at Jeddah, 35 of the cases were missing and the agents of the defendant company at Jeddah granted a certificate that the 35 cases had been short delivered. Held that the certificate contained a clear acknowledgment that the 35 cases which ought to have been delivered had not been delivered; and from that followed the legal incident of the defendant’s position to pay

compensation in respect of non-delivery—*Haji Ajam v. Bombay & Persia S. N. Co.*, 26 Bom. 562 (569).

178. Acknowledgment, to whom to be made :—It is not necessary that the acknowledgment of liability must be made to the person who is entitled to the right in respect of which the liability arises, or to any one through whom he claims. An acknowledgment, to whomsoever made, is a valid acknowledgment if it points with reasonable certainty to the liability under dispute—*Gura Charan v. Surendra*, 19 C.W.N. 263, 22 I.C. 650; *Shamsud Ali v. Miriam Elias*, 30 C.W.N. 968, 97 I.C. 710; *Bhagwan v. Madhav*, 24 Bom. L.R. 713, 46 Bom. 1000; *Venkata Krishniah v. Subbarayadu*, 40 Mad. 698; *Abdul v. Von Goldstein*, 43 P.R. 1910, 14 P.L.R. 1909, 4 I.C. 902; *Tanner v. Smart*, (1827) 6 B. & C. 603; *Halliday v. Ward*, (1811) 3 Camp. 32; *Moodie v. Bannister*, (1859) 4 Drew. 432. See Explanation 1.

It was held in a Calcutta case that an acknowledgment to be operative must be made to the creditor or to a person through whom he claimed or at least must be addressed to some person, though not necessarily the person entitled to the right. Therefore the recital of a debt in a conveyance, which was not addressed to any person nor was communicated to the creditors or any body on their behalf, was not a sufficient acknowledgment—*Imam Ali v. Baij Nath*, 33 Cal. 613, following *Mylapore v. Yeo Kay*, 14 Cal. 801 (P.C.) Similarly it was held in a Bombay case that an entry in the debtor's book of account was not an acknowledgment because it was not communicated or addressed to the creditor or some person—*Mahalakshmi Bai v. Nageswar*, 10 Bom. 71. But the authority of these rulings has been shaken by the Privy Council decision in *Maniram Seth v. Seth Rupchand*, 33 Cal. 1047 (P.C.) in which the acknowledgment was not addressed to the creditor or to any person but was contained in a petition for probate, and by another decision of the same high tribunal in *Hiralal v. Narsilal*, 37 Bom. 326 P.C. (cited below) in which the acknowledgment was contained in a certain book of the Government Agent. See 45 Bom. 934 at page 943. In fact, it will be evident from the undernoted cases that an acknowledgment is not required to be addressed to any person, much less to the creditor or some person through whom he claims.

Thus, a deposition given and signed by a party as a witness in a suit is a sufficient acknowledgment in writing under sec 19—*Venkata v. Parthasaradhu*, 16 Mad. 220; *Peria Venkan v. Subramanian*, 20 Mad. 239; *Meghraj v. Mathura*, 35 All. 437, *Subramania v. Veerabhadra*, 41 M.L.J. 217, A.I.R. 1921 Mad. 464; so also, a written statement in a former suit and containing a distinct acknowledgment of a mortgage or debt or right will give a fresh starting point of limitation—*Balmokand v. Ramji Lal*, 20 P.R. 1887; *Jeba v. Chaman*, 16 P.R. 1891, *Shrinivas v. Narhar*, 32 Bom. 296; *Venkataratnam v. Ramaraju*, 24 Mad. 361; *Kadira Pakirappa v. Monki Husan*, 19 M.L.J. 650, 3 I.C. 19; *Official Assignee v. Subramania*, 46 M.L.J. 1, A.I.R. 1924 Mad. 286; *Indar Pal v. Mewa Singh*, 36 All. 264; *Ganga Sahai v. Khazan Chand*, 1 Lah. 357; *Balbhaddar v. Sheo Pearey*, 6 O.W.N. 943, A.I.R. 1930 Oudh 67 (68); *Ram Autar*

v. *Beni Singh*, 25 O.C. 89, 10 O.L.J. 7, A.I.R. 1922 Oudh 135. But where the written statement in the previous suit merely called upon the plaintiff to produce the promissory note adverted to in the plaint in that case, it was held that the written statement was insufficient to establish an acknowledgment of liability in respect of the promissory note which was the foundation of the present claim—*Kapur v. Narinjan*, 34 P.R. 1918, 45 I.C. 99. A statement contained in a plaint in a case filed by the grandfather of the mortgagee to the effect that the property is mortgaged to him is an acknowledgment of liability in respect of the mortgagor's right to redeem—*Hari Chand v. Phiraya*, 180 P.L.R. 1911, 11 I.C. 377. So also, where in a suit for redemption of a mortgage the plaintiff, who was the purchaser of a portion of the mortgaged property, stated in his plaint that there were other persons interested in the redemption of the property who had not joined in the suit, and that therefore he was seeking to redeem the entire mortgage making the other persons as *pro forma* defendants, held that this statement amounted to an acknowledgment of the right of the other co-mortgagors to redeem—*Baleshar v. Ram Deo*, 36 All. 408. Where a debt due on a promissory note executed by the deceased was included in the form of valuation filed with the petition for the grant of letters of administration to the estate of the deceased, held that the inclusion of the debt amounted to an acknowledgment of liability—*Raja Rama v. Fakuruddin*, 58 M.L.J. 210, A.I.R. 1930 Mad. 218.

A statement contained in a *Kobala* that a certain mortgage on some of the properties comprised in the *Kobala* is still subsisting has the effect of an acknowledgment so as to create a new period of limitation—*Azizur v. Ram Chandra*, 91 I.C. 461, A.I.R. 1926 Cal. 693. An entry in the *wajib-ul-arz* in which the mortgagee stated the amount of the mortgage and the names of the parties, is an acknowledgment in respect of the mortgagor's right to redeem—*Kamala Devi v. Gundayal*, 17 A.L.J. 330, 51 I.C. 283 (284). A statement mentioning the mortgage in a pedigree of the co-sharers of the village which was the subject of the mortgage, signed by the mortgagees, and an entry in the village *wajib-ul-arz* signed by them and duly verified before a Settlement Officer, are valid acknowledgments so as to give a fresh period of limitation in respect of the mortgagor's suit for redemption—*Suraj Baksh v. Ganga Baksh*, 4 O.W.N. 882, 105 I.C. 93, A.I.R. 1927 Oudh. 457. Where a certain *desaiguri dastur* having been mortgaged on 4th November 1793, the mortgagees procured the entry of their names in the Collector's books as mortgagees, and on 8th June 1843, an entry of payment to the mortgagees of their respective shares of the allowance was made in the books of the Government Agent entrusted with the payment thereof, and the mortgagees signed their names against it acknowledging receipt of their shares, held that a new period of limitation started from the date of the acknowledgment and a suit for redemption brought in 1901 was in time—*Hiralal v. Narsilal*, 37 Bom. 326 (P.C.). Certain lands were mortgaged with possession in 1826. Government issued sanads to the holders of the lands in 1865 and 1876. These sanads were entered in a register where the mortgagee was described as holding the lands as mortgagee, and the

entries were signed by the mortgagee. On the death of the mortgagee a similar sanad was granted to his widow in 1882, and was similarly entered in the register and signed by the widow. The mortgagor having sued for redemption in 1917, *held* that the registers having the signatures of the mortgagee and his widow were acknowledgments of the mortgagee's liability to be redeemed by the mortgagor and consequently the suit was not barred—*Pranjivan Das v. Bai Mani*, 45 Bom. 934 (dissenting from *Imam Ali v. Baijnath*, 33 Cal. 613).

If the insolvent writes down a debt in his schedule as owing the debt to a named person and signs the schedule, it would operate as an acknowledgment under this section—*Shrigopal v. Dhanalai*, 35 Bom. 383; *Chettyar Firm v. Munnee*, 6 Rang. 533, A.I.R. 1928 Rang. 326 (327), 117 I.C. 570; *Rampal v. Nand Lal*, 16 C.W.N. 346, 13 I.C. 603. In a suit to redeem a kanom, the plaintiff set up in bar of limitation an acknowledgment contained in the will of the deceased mortgagee who thereby devised to his son certain lands therein described as held by him on kanom. The mortgagor's name was not mentioned nor the date of the kanom, nor was there any further description of the lands; it was held that the will constituted an acknowledgment, notwithstanding the absence of the name of the mortgagor and the date of the mortgage—*Uppi v. Mammavan*, 16 Mad. 366. Where the defendants attested as correct the record of rights prepared at a settlement with them of an estate in which they were described as mortgagees, but which did not mention the name of the mortgagor, it was held that there was an acknowledgment of the mortgagor's right to redeem—*Daia Chand v. Sarfraz*, 1 All. 117. Where a mortgagee sold his right in the mortgaged property, and in the deed he stated that he was holding the property as a mortgagee under a mortgage-deed dated 11th June 1849, *held* that the statement in the sale-deed was an acknowledgment which extended the time for the purpose of redemption—*Har Narayan v. Sheo Prasad*, 11 A.L.J. 86, 18 I.C. 95.

Under the English law, an acknowledgment to a stranger is inoperative—*Stamford v. Smith*, [1892] 1 Q.B. 765, *Rogers v. Quinn*, 26 L.R. Ir. 136.

179. Other instances of acknowledgment:—Where the creditor granted an extension of time on the written application of the debtor praying for extension, the written application amounted to an acknowledgment—*Sugappa v. Gobindappa*, 12 M.L.J. 351. A mortgagor subsequent to his mortgage executed two promissory notes in favour of the mortgagee, in one of these notes he referred to the mortgage-debt thus: "the amount due under the mortgage-deed is set apart," in another he wrote "besides this, the mortgage-debt is distinct." These notes would be sufficient acknowledgments of the mortgage—*Dinkar v. Chhaganlal*, 38 Bom. 177. An acknowledgment which is valid in other respects cannot be inoperative simply because it contains a wrong date in respect of the debt. Where in a previous suit for ejectment the defendant alleged that he was in possession as usufructuary mortgagee under a specific mortgage of 1842, it was held that in a suit for redemption the above statement amounted to an acknowledgment, although it was

found that the mortgage was that of a date earlier than 1842—*Dip Singh v. Girand*, 26 All 313. See also *Har Narain v. Sheo Prosad*, 11 A.L.J. 86, 18 I.C. 95. In a suit upon a joint and several bond brought against the defendant as a principal debtor, an acknowledgment of liability made by him as surety only is sufficient to save limitation—*Uncovenanted Service Bank v. Grant*, 10 All. 93.

A *hatchitta* is an acknowledgment within the meaning of this section—*Mahendra Nath v. Lalit Mohan*, 46 Cal. 746. A *ruzukhata* (i.e. account stated, being the totalling up of the items of an account and adding interest and acknowledging their correctness) signed by the debtor and made within the period of limitation implies a promise to pay the debt and can form the basis of a suit—*Chunilal v. Laxman*, 46 Bom. 24, A.I.R. 1922 Bom 183, 23 Bom. L.R. 606.

When a person borrows a sum of money and executes a promissory note, he executes it for the consideration received by him, and when it is executed in respect of a consideration already passed, it is an acknowledgment of the liability to pay the amount mentioned in the note. Even though the promissory note cannot be enforced for some cause (e.g. as offending against sec 26 of the Paper Currency Act) it can nevertheless be used as evidence of an acknowledgment of liability—*Kesavaramayya v. Venkataratnam*, 50 M.L.J. 36, 92 I.C. 626, A.I.R. 1926 Mad 452; *Nachimuthu v. Audiappa*, 1917 M.W.N. 778, 42 I.C. 706, 6 L.W. 630. An endorsement on a promissory note amounts to an acknowledgment of liability for the balance due under the note. Thus, the defendant executed a promissory note on November 12, 1913 for Rs. 1,500. Payments were made of Rs. 90 in February 1913, Rs. 200 in January 1916 and Rs. 381 in April 1916. On November 6, 1916 he endorsed on the note the three payments which had been made on the previous dates, added up the total and signed underneath. Held that the endorsement meant that the promisor recorded that he had paid Rs. 671 against the liability under the promissory note and that consequently he admitted his liability to pay the balance. As a matter of common law, an endorsement on a promissory note by the promisor is an acknowledgment of liability which starts a fresh period of limitation from the date on which it was made, and it makes no difference that such endorsement is below an account showing what has already been paid under the promissory note—*Ganesh v. Dattatraya*, 47 Bom 632, 25 Bom. L.R. 144, 72 I.C. 249 (following *Venkata Krishniah v. Subbarayudu*, 40 Mad 698).

180. Acknowledgment when not valid :—Acknowledgment made by a person under legal disability is not valid. Thus, an acknowledgment given by a minor is inoperative and cannot give a fresh start of limitation—*Aniz-ul-Raman v. Beni Ram*, 59 P.R. 1901.

An acknowledgment not coming directly from the debtor himself but merely deduced as an inference from the tenor of a series of letters is not a proper acknowledgment. There must be some principal writing of a particular date (from which the new period of limitation is to run) which can be relied on by itself. A series of letters in none of which

there is a definite acknowledgment of the debt is not sufficient—*Rogers v. Montrou*, 6 B.L.R. 550. An acknowledgment of a different kind of liability is not sufficient to save limitation. Thus, an admission made by a tenant that he held the land as a *mulgani* (permanent) tenant at a lighter rent is not an acknowledgment entitling the landlord to recover rent from the defendant as a *chalgani* tenant (tenant from year to year)—*Venkataramana v. Srinivasa*, 6 Mad. 182. The acceptance of a sale-certificate by the purchaser of a mortgagee's interest in land, sold in satisfaction of a decree against him, is not an acknowledgment by the purchaser of the title of the mortgagor, so as to give him a fresh starting point for a new period within which he can redeem—*Raman v. Krishna*, 6 Mad. 325 (327). Where the defendants in the present partition suit had made in a written statement filed by them in a previous suit the following statement, viz "proper parties have not been joined in this suit, since A and S left a sister B who died after them. It is necessary to join her heirs in the suit;" it was held that the above words were not an admission that B's heirs had a share in the estate, and did not amount to an acknowledgment of liability—*Bibi Saheb v. Syed Mir Mahammad*, 9 S.L.R. 143, 32 I.C. 548.

An acknowledgment of liability contained in a communication made to a public officer in official confidence cannot be relied upon, since that communication is inadmissible in evidence under the provisions of sec 124 Evidence Act. Thus, in a suit on a mortgage bond, the mortgagee cannot rely upon a letter written by the mortgagor to the Collector, in which the mortgagor had mentioned the mortgage and had stated that he was financially embarrassed and desired the Court of Wards to take charge of his estate. Such a statement is made solely with the purpose of giving information to the Court of Wards on the strength of which the Court of Wards may decide whether or not the estate should be taken over; such a communication made to the Collector in official confidence cannot be made public property and cannot be relied upon by the creditor as an acknowledgment of liability—*Collector v. Jamna Prasad*, 44 All 360 (366), 20 A.L.J. 140.

The delivery of a *hundi* and a cheque which are dishonoured on presentation does not amount to an acknowledgment—*Padma Lochan v. Girish Chandra*, 46 Cal 168 (170). But where the *hundi* (which was given and dishonoured) was accompanied by a letter of the defendant acknowledging his liability on the *hundi*, held that there was a sufficient acknowledgment of the debt—*Raman v. Vairavan*, 7 Mad 392.

An oral acknowledgment of a debt is not valid. This section requires the acknowledgment to be in writing—*Ghasita v. Sultan*, 93 P.R. 1911, 11 I.C. 445.

181. Signing:—An acknowledgment without signature is no acknowledgment—*Jaggi v. Sri Ram*, 34 All 464. An admission of a debt in a draft will written by the testator in the first line of which his name appeared but which was not signed by him, did not constitute an acknowledgment under this section—*Ramasami v. Muttasami*, 15 Mad 350.

Entries in the debtor's account books not signed cannot be treated as an acknowledgment under this section—*Palaniappa v. Veerappa*, 41 Mad. 446, 34 M.L.J. 41. A deposition made by the defendant in another suit but neither signed by him nor by his authorised agent does not amount to a proper acknowledgment—*Kapur v. Narinjan*, 1918 P.R. 34, 45 I.C. 99.

Signature need not necessarily be by writing one's name. Making his mark by an illiterate debtor is sufficient—*Bheemangowda v. Eeranah*, 7 M.H.C.R. 358; *Jamna v. Jaga*, 28 Bom. 262. Under section 3 (52) of the General Clauses Act, "Sign should, with reference to a person who is unable to write his name, include his mark."

Signature by initials is not valid, and an acknowledgment merely bearing initials instead of signature is not proper—*Lakshmanachayulu v. Venkataramanuja*, 51 M.L.J. 414, A.I.R. 1926 Mad. 827, 96 I.C. 700.

It does not matter in what part of the document—at the top or the bottom—the signature is placed, provided the signature is introduced into the document with a view to authenticate it—*Mahalakshmi v. Nageswar*, 10 Bom. 71; *Mathura v. Babu*, 1 All. 683 (686); *Mohesh Lal v. Busunt*, 6 Cal. 340; *Onkarlal v. Raj Mahomed*, 17 N.L.R. 209, 65 I.C. 279. If there is a particular custom of signing among the class or community to which the defendant belongs, and if the defendant signs according to that custom, that would be a sufficient signature. For instance, where a certain letter contained certain specified words in the handwriting of the defendant at the top and the bottom, and the evidence showed that among the community to which the defendant belonged, this was the usual custom of signing letters and informal documents, it was held that the writing of the specified words amounted to "signing"—*Gangadhar v. Shidramapa*, 18 Bom. 586. So also, according to the custom and practice of Natukottal Chetties, who do not sign their letters at the foot but begin by saying that the letter is from such and such a firm, the same so written is a sufficient signature—*Muthua v. Kuttayan*, 1918 M.W.N. 42, 43 I.C. 20. Where in a *hatchitta*, which represented the account between the defendant and the plaintiff, the defendant's name was entered at the top of the entries on the debit side which were admittedly written by the defendant, and he wrote the words *likhitang khode* (written by self) at the bottom of the entries, it was held that this was the mode adopted by the debtor of "signing" the *hatchitta*—*Sadasook v. Baikanta*, 31 Cal. 1043. The name of a firm in the heading of a letter written in the course of business is a sufficient signature—*Uma Shankar v. Gobind*, 46 All. 892, 22 A.L.J. 807, A.I.R. 1924 All. 855.

Rajahs, Maharajas and great Zemindars often sign without any name. They simply put down the words 'Sree' or "Maharaja" or the name of the place (e.g. Burdwan, Nuddia); such a signature is sufficient. See *Gunee Biswas v. Sreegopal*, 8 W.R. 395.

Where an illiterate defendant merely touched a pen and asked another person to write his name, this was held to be a sufficient signature—*Krishnachar v. Vadichi*, 6 M.L.J. 209. A balance of account was written by a person at the request of an illiterate debtor in the debtor's name

and signed by the writer in his own name; it was held to be a sufficient acknowledgment—*Hem Chand v. Vohora*, 7 Bom. 515.

Where the whole of an account stated (*khata*) was written by the debtor himself with the introduction of his name at the top of the entry, the *khata* was held to be sufficiently signed within the meaning of this section—*Jekisan v. Bhowsar*, 5 Bom. 89; *Holmes v. Mackrell*, (1858) 3 C.B. (N.S.) 789.

182. Signing by agent :—For the purposes of this section, the writing containing the acknowledgment need not be signed by the debtor himself; it would be sufficient if the signature is that of an authorised agent—*Muthiah v. Kutlayan*, 1918 M.W.N. 42, 43 I.C. 20. The person authorised to give the acknowledgment may sign his name or that of his principal—*Onkarlal v. Raj Mahomed*, 17 N.L.R. 209, A.I.R. 1921 Nag 1. Where the name of the mortgagor appeared in a document in the handwriting of another person, and there was nothing to show that that person was authorised to sign the name of the mortgagor, the document was held not to be validly 'signed'—*Gokul v. Saheb*, 15 A.L.J. 121, 38 I.C. 102.

As to who is an agent duly authorised, see Note No. 190 *infra*.

183. "Against whom the right is claimed" :—Section 10 does not require that the person making the acknowledgment of liability in respect of any property should have an interest in the property at the time when the acknowledgment is given. It is sufficient if the acknowledgment has been made by the person against whom the right is claimed—*Jugul Kishori v. Fakhruddin*, 20 All. 90. In this case the plaintiff brought a suit in 1903 for possession of a house which he purchased at an execution sale in 1890, and in order to save limitation he relied on an admission made by the defendant in a suit for pre-emption brought by the latter against the plaintiff in 1892. In that suit the defendant admitted that the plaintiff purchased the house at an execution sale. The Lower Court held that the admission was insufficient to save limitation, because the defendant when he made the admission had no interest in the property, his father being then alive. The High Court held that under section 19 the question does not arise as to whether the defendant had any interest in the house when he made the admission; all that this section requires is that an admission was made by the person against whom the right is claimed, and that is sufficient to save limitation.

"Through whom he derives title or liability"—An acknowledgment made by the mortgagor after he had assigned one of the mortgaged properties, is sufficient to keep alive the mortgage-debt against the assignee and against the property assigned, because the acknowledgment was made by a person through whom the assignee derived his title or liability within the meaning of this section—*Krishna Chandra v. Bhairab*, 32 Cal 1077 (1908).

184. Unstamped acknowledgment :—An unstamped acknowledgment can not be given in evidence for any purpose including the purpose of saving limitation—*Malji v. Linga*, 21 Bom. 201 (F.B.) (overruling *Tatechand v. Kishan*, 16 Bom. 614); *Gulstann v. Hutchinson*, 39

Cal. 789, 16 C.W.N. 945; *Nagappa v. V. A. A. R. Firm*, 49 M.A.I.R. 1925 Mad. 1215.

185. Unregistered acknowledgment:—Though a sordidly registerable but unregistered document relating to land is sible in evidence in respect of any question as to the land or it, it would nevertheless be good evidence between the parties for other purpose, e.g., as an acknowledgment of a debt recited as to give a fresh starting point of limitation—*Nundo v. Ramse* Cal. 215; *Mugniram v. Gurmukh*, 26 Cal. 334; *Chuhar v. W* P.R. 1881; *Syad Muhammed v. Jaisukh*, 88 P.R. 1880; *Khushal v* 3 All. 523; *Kubra v. Lalji*, 20 O.C. 13, 38 I.C. 582. Thus an unregistered mortgage-deed may be accepted as an acknowledgment of the debt, though it cannot be received as evidence of a transaction in the real property—*Syad Muhammad v. Jaisukh*, 88 P.R. 1880; *C Wazira*, 17 P R 1881.

But if the acknowledgment were in respect of a right in immovable property, the provisions of the Registration Act would have to be taken into consideration, and its admissibility would depend upon whether it was required to be registered or not. Thus a compulsorily registrable but unregistered receipt, if it contains an acknowledgment of an interest in immovable property, will be inadmissible in evidence—*Faki v. 4 Bom.* 590.

186. Effect of acknowledgment:—The acknowledgment of a debt does not alter the quality of the debt and does not create a new debt—*Kamal v. Krishna*, 3 I.C. 34. Thus, the acknowledgment does not entitle the creditor to claim interest at a higher rate than which was prevailing up to the date of acknowledgment—*Tanjor chandra v. Vellyanandan*, 14 Mad. 258 (P.C.).

An acknowledgment of a mortgage-debt is good not only as against the person acknowledging, but also as against those deriving title from him even prior to the date of acknowledgment and subsequent debt acknowledged—*Velayudu v. Narasimha*, 32 M L J. 263, 38 I.C. 11. But an acknowledgment of liability made by one of the heirs of a debtor can be used only against the person acknowledging but not against all the heirs of the debtor—*Collector of Jaunpur v. Jamna Prasad* All. 360 (367), 20 A.L.J. 140, 66 I.C. 171; *Raja Rama v. Faku* 58 M.L.J. 210, A.I.R. 1930 Mad 218.

If a person admits a right, it is a necessary implication that he admits the legal consequences of that right. Therefore, where a person admits that the land of which he is in possession belongs to another, he admits that he is liable to restore the land to that other—*Guru v. Surendra*, 19 C.W.N. 263, 22 I.C. 650. An acknowledgment of a current account implies an acknowledgment to have accounts settled and implies a promise to pay, should the balance turn out to be against the person making it—*Bengal National Bank v. Jatindra*, 56 Cal 5 C.W.N. 412 (415). Where the defendant stated that for the last 10 years he had open and current account with the plaintiff's predecessor

the legal consequence would be that either of the parties had a right against the other to an account; it followed equally that whoever on the account should be shown to be the debtor to the other was bound to pay his debt to the other, and the inevitable deduction from the admission is that the defendant acknowledged his liability to pay his debt to the plaintiff, if the balance should be ascertained to be against him—*Maniram Seth v. Seth Rup Chand*, 33 Cal. 1047 (1057) P.C. Where a mortgagor describes his mortgagee as such and the latter admits in writing over his signature the correctness of that description, it is a necessary implication from the admission that the mortgagee acknowledges all the legal consequences of his position, one of which is his liability to be redeemed—*Sheikh Mahomed v. Jamaluddin*, 10 Bom L.R. 385; *Ahmad Haji v. Mayan*, 57 M.L.J. 789, A.I.R. 1930 Mad. 65. An acknowledgment by a mortgagor of his liability under the mortgage carries with it an admission of all the remedies to which the mortgagee might be entitled under it—*Thakur Basant Singh v. Thakur Rampal*, 6 O.L.J. 248, 51 I.C. 985; *Ram Ahtar v. Beni Singh*, 25 O.C. 89, 68 I.C. 196. Similarly, an acknowledgment by a mortgagor in favour of the first mortgagee operates as against the puisne mortgagee whose title originated through the 1st mortgagee before the acknowledgment was given—*Arbindakeb v. Jageshar*, 17 A.L.J. 763, 51 I.C. 829; *Lakshmanan v. Muthiah*, 40 M.L.J. 126, 62 I.C. 833. An acknowledgment made by a mortgagor after he had assigned one the mortgaged properties, is sufficient to keep alive the mortgage-debt against the assignee and against the property assigned—*Krishna Chandra v. Bhairab*, 32 Cal 1077 (1080), 9 C.W.N. 868. In England however, an acknowledgment signed by the mortgagor after the assignment of the mortgaged property will not give the mortgagee a fresh period against the assignee—*Newbould v. Smith*, (1886) 33 Ch D. 127. But this English ruling has been virtually dissented from in *Krishna v. Bhairab*, supra, and disapproved of in *Domilal v. Roshan*, 33 Cal. 1278.

An acknowledgment of the submortgage, made by the submortgagee does not involve an acknowledgment of the original mortgage, and therefore it will not operate to extend the period of limitation for a suit for redemption brought by the original mortgagor against the original mortgagee—*Bhagwan Ganapati v. Madhab Shankar*, 46 Bom 1000, 24 Bom. L.R. 713, 70 I.C. 906. But where the submortgagee in submitting a list of the properties to be sold in execution of a decree obtained by him against his mortgagor (the original mortgagee) had described the property as subject to the original mortgage, held that the description amounted to an acknowledgment and saved limitation as against him in a suit brought by the original mortgagor to redeem the original mortgage—*Sannal Das v. Sayid Ali*, 22 A.L.J. 1018, A.I.R. 1925 All 174, 85 I.C. 330. The admission of liability to pay interest under the mortgage amounts to an acknowledgment of liability under the mortgage, including liability to give possession to the mortgagee under the terms of the mortgage—*Anant Ram v. Inayat Ali*, 2 Lah L.J. 549. But an acknowledgment of liability in respect of the amount due as principal does not

involve the admission to pay interest—*Fillip & Co. v. Mahomedalli*, 13 S.L.R. 183, 55 I.C. 822 An admission that a certain person has purchased the property is not an admission that that party has acquired a good title in the property, for it is quite consistent with an assertion that the purchase was bad in law, and did not operate to confer any title on the alleged purchaser—*Imdad Ali v. Nandkumar*, 7 P.L.T. 9, A.I.R. 1925 Pat 473, 88 I.C. 478 An admission that a certain person has recovered judgment in an action of ejectment is not an admission of title, for it is quite consistent with an assertion that the judgment in ejectment was wrong and that the person had no title at all—Halsbury's Laws of England, Vol 19, p 132

An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do—*Maniram Seth v. Seth Rupchand*, 33 Cal. 1047 (P.C.), 33 I.A. 165. An unconditional acknowledgment implies an unconditional promise to pay, and if it is made before the limitation period expires, it can itself be the foundation of an action—*Govind Singh v. Bijay Bahadur*, 27 A.L.J. 1279, A.I.R. 1929 All. 980 (982), *Chunnilal v. Laxman*, 46 Bom. 24, A.I.R. 1922 Bom. 183 The contrary ruling in *Shankar v. Mukta*, 22 Bom. 513 is no longer good law in view of the above Privy Council decision (33 Cal. 1047). In a single Bench decision of the Allahabad High Court it has been held that a mere acknowledgment of liability cannot be made the basis of a suit so as to constitute a fresh cause of action, but in a suit based on the original consideration the acknowledgment can be relied upon as a piece of evidence in proof of the debt—*Reoli Ram v. Lachman*, 23 A.L.J. 900, 89 I.C. 402, A.I.R. 1926 All. 155 (156) (following *Ganga Prasad v. Ram Dayal*, 23 All. 502).

Acknowledgment in favour of minor —If an acknowledgment is made in favour of a minor, the new period of limitation is to be computed from the date when the plaintiff becomes a major—*Ramji v. Manyu*, 1919 P.L.R. 37, 52 I.C. 115; see also 13 Mad 135 in Note 187 below.

Acknowledgment of part of debt :—An acknowledgment of a part of a debt will keep it alive only to that extent—*Chandra v. Ramdin*, 16 C.W.N. 493.

187. New period of limitation :—"The expression 'fresh period' presupposes the previous running of another period of limitation. Hence the new period is to be calculated from the date of acknowledgment only when that date is subsequent to the date from which the period would otherwise be computed. Thus a written acknowledgment of liability made before the debt has fallen due, *i.e.*, before time has commenced to run, is of no effect so far as the shortening or extending of the time for the institution of suits is concerned"—Banning, 2nd Ed., p. 127.

In computing the period of limitation, the date on which the acknowledgment was signed (*i.e.*, the date from which the new period of limita-

tion runs) must be excluded under sub-section (1) of section 12—*Jai Narain v. Vithoba*, 6 N.L.J. 281, A.I.R. 1923 Nag. 143, 71 I.C. 556.

This section speaks of a new period of limitation, not an extension of the old period. For instance, time began to run against the plaintiff's father, and, after his death, against the plaintiff who was then a minor; subsequent to the death of the father, an acknowledgment of liability was made by the defendant in favour of the plaintiff during his minority. Under this section, the effect would be that the period already running is not simply extended but terminates, and an entirely new period of limitation runs from the date of acknowledgment, and as the minor falls under the strict wording of section 6, limitation would run from the date of his attaining majority—*Venkataramayyar v. Kothandaramayyar*, 13 Mad. 135.

Similarly, when the defendant acknowledges the liability while he is absent from British India, the period already elapsed is cancelled and a new period begins to run; and if the defendant continues to remain abroad, time will not run until he returns, by virtue of sec. 13.

188. Oral evidence :—Oral evidence of the contents of a document cannot be received. Therefore, where the acknowledgment of a debt was signed by the debtor each year, and on the signing of a fresh acknowledgment, the old one was given back to the debtor, no oral evidence of these old acknowledgments could be given so as to show that they had been given while the debt was still unbarred—*Ziulnissa v. Motdev*, 12 Bom. 268. But this section must be read with sections 65 and 91 of the Evidence Act and does not exclude secondary evidence in cases in which the same would be admissible under section 65 of that Act—*Chathu v. Virarajan*, 15 Mad. 491. For instance, where the original document has been lost or destroyed, it is open to the plaintiff to give secondary evidence of the contents of the said document—*Shambhu v. Ram Chandra*, 12 Cal. 267, *Wajiban v. Kadir*, 13 Cal. 292.

Where the date of acknowledgment has been altered, no evidence can be received as to the date on which it was given—*Sayed Ghulam Ali v. Mujabai*, 26 Bom. 128. Where there are more debts than one, oral evidence will not be received to identify the debt acknowledged with the debt sued on, for that would involve a question of the intention of the debtor as to what debt he meant; and no parol evidence of the intention of the party can be admitted for the purpose of identifying the debt acknowledged—*Beti Maharani v. Collector*, 17 All. 198 (P.C.). But where there is only one debt, and the acknowledgment omits to mention the name of the mortgagor or the date of the mortgage or the amount of the debt, parol evidence is admissible to prove the name, the date or the amount—*Uppi v. Marimavan*, 16 Mad. 366, *Narayana v. Venkata ramana*, 25 Mad. 220 (F.B.). In England also, the date of the bond may be supplied by parol evidence, as also the name of the creditor to whom the debt is owing—*Hartley v. Wharton*, (1840) 11 A. & E. 914; *Edmunds v. Downes*, (1834) 2 Cr. & M. 459. Parol evidence may also be received to prove the exact amount due—*Dickinson v. Hatfield*, (1831)

1 Moo. & R. 141; *Colledge v. Horn*, (1825) 3 Bing. 119; *Cheslyn v. Dalby*, (1840) 4 Y. & C. 238.

189. Explanation—"Exact nature of property or right":—An acknowledgment is sufficient even though it omits to specify the exact nature of the property or right; that is, an acknowledgment need not necessarily be in respect of the particular relief prayed for in the suit or application. It is sufficient acknowledgment if it is of a liability whether pecuniary or in relation to other obligations, and is in respect of a right or property which is the subject matter of the suit or application—*Jageshar v. Bir Ram*, 23 O.C. 176, 60 I.C. 189.

Claim to a set-off:—Section 19 applies where the acknowledgment is coupled with a claim to a set-off. Under the English law also, a claim to a set-off does not negative a promise to pay—*Leland v. Murphy*, (1865) 16 Ir. Ch. R. 500. But where a plea in the written statement sets forth that the money is not owing and if it is, it must be set-off against an amount, such a plea is not an acknowledgment of liability; it is a denial of liability with a claim to a set-off in the alternative—*Shaik Meera v. Shaik Nainar*, 25 M.L.J. 259, 21 I.C. 30.

Refusal to pay:—An acknowledgment is sufficient, even if it is accompanied by a refusal to pay—*Janardan v. Radhaballabh*, 23 C.W.N. 921, 53 I.C. 898. According to English law, however, such an acknowledgment is insufficient, a promise to pay being the essential requisite of every acknowledgment. See *Lee v. Wilmot*, (1865) L.R. 1 Ex. 364.

Addressed to a person not entitled to the right:—See Note 178 ante under heading "Acknowledgment to whom to be made."

190. Agent duly authorised:—The test for determining the effect of acknowledgment by a third person will in each case be whether the person who keeps alive the debt had express or implied authority to act on behalf of those against whom limitation is sought to be arrested—*Kothandaraman v. Shanmugam*, 32 I.C. 608 (Mad.).

The words 'agent duly authorised' denote a general as well as a special authority. The authority contemplated in this section need not be in writing—*Deo Narain v. Kukur Bind*, 24 All. 319 (F.B.). A manager, who has got general authority to purchase and pay for all things required for the use of his principal, can, without any special authority, give a note promising payment of the price of goods to the supplier of the goods; and the note is a sufficient acknowledgment of liability made by 'an agent duly authorised' within the meaning of this section—*Raja Braja Sundar Deb v. Bhola Nath*, 24 C.W.N. 153 (P.C.), 55 I.C. 543, A.I.R. 1919 P.C. 120. But a *Mukhtar-am* has no power to acknowledge a liability under this section unless he has been given special authority to make the acknowledgment of the liability—*Narain Rao v. Manni Kunwar*, 44 All. 546, 20 A.L.J. 359, 66 I.C. 394. The mere fact that the defendant used to write letters on behalf of the principal is not sufficient in law to enable the Court to infer that he was an authorised agent for the purposes of making an acknowledgment of liability—*Uma:*

Shanker v. Govind, 46 All. 892, 22 A.L.J. 807, A.I.R. 1924 All 855, 80 I.C. 6

Guardian—See sec. 21. A guardian appointed under the Guardians and Wards Act, 1890, is an “agent duly authorised” and is competent to make an acknowledgment, provided it be shewn that the guardian’s act was for the benefit of the ward—*Annapagauda v. Sangadigypa*, 26 Bom. 221 (F.B.); *Sobhandari v. Sriramulu*, 17 Mad. 221. Similarly, an acknowledgment by a natural guardian will give a fresh start for limitation, if it be shewn that the acknowledgment was for the benefit of the minor—*Bhullu v. Naralal*, 8 Bom. L.R. 812; *Ram Charan v. Gaya*, 30 All. 422 (F.B.); *Kailasa v. Pennu Kannu*, 18 Mad 456.

The Calcutta High Court was of opinion that no guardian (whether certificated or natural) could acknowledge a debt on behalf of the minor—*Wajibun v. Kadir*, 13 Cal. 292; *Chhato v. Bilito*, 26 Cal. 51; *Narendra v. Rai Charan*, 29 Cal. 647. But these cases are no longer good law in view of sec. 21 (1).

Manager of joint family :—The manager of a joint Hindu family has power to acknowledge the liability of the family, and in so doing he would be considered as the agent duly authorised to bind the other members; in such a case the acknowledgment need not be expressed as having been made in his capacity as *Karta*—*Hari Mohan v. Sourendra*, 41 C.L.J. 535, A.I.R. 1925 Cal. 1153; *Sarada v. Durgaram*, 37 Cal 461; *Har Prosad v. Bakshi Harihar*, 19 C.W.N. 860, 31 I.C. 30; *Bhaskar v. Vijalal*, 17 Bom. 512; *Inderpal v. Mewalal*, 36 All. 264 (267); *Sanwal v. Saijit Ali*, 22 A.L.J. 1018, A.I.R. 1925 All. 174, *Chinnaya v. Gurunathan*, 5 Mad 169 (F.B.); *Ram Autar v. Beni Singh*, 25 O.C. 89, A.I.R. 1922 Oudh 135. See the new sub-section (3) of sec. 21 recently added by the Amendment Act of 1927. But where a creditor deals not merely with the managing member of a family, but with all the members as co-obligors, he cannot rely on an acknowledgment made by the manager as an acknowledgment made on behalf of all the members—*Narayana v. Venkataramana*, 25 Mad 220 (F.B.). An acknowledgment made by a member of the joint Hindu family, who is *not* the manager of the family, binds only the person acknowledging and the persons who claim through him, but not the other members of the family—*Ramkishan v. Hurde Ram*, 71 I.C. 737, A.I.R. 1923 Lah. 135.

Court of Wards :—The Court of Wards has power to make acknowledgment of a debt due by the ward which would bind the ward and give a fresh starting point for limitation—*Rashbehary v. Anand* 43 Cal. 211. An acknowledgment by the Collector and Deputy Collector as agents of the Court of Wards is equally binding on the minor—*Kannamodulu v. Alluri Sarwarayudu*, 34 Mad 221.

Sarbarakar :—The sarbarakar of a disqualified person not being a guardian and having nothing to do with the person or property of the proprietor, but appointed only to manage the lands owing to the incompetency of the proprietor, cannot be regarded as a person authorised

to admit the personal debt of the proprietor for the purpose of this section—*Beti Maharani v. Collector*, 17 All 193 (P.C.).

Co-mortgagee :—Where the mortgage is joint and incapable of being redeemed piecemeal, one mortgagee is not an agent for the other joint-mortgagees; and an acknowledgment of the mortgagor's title made and signed by one mortgagee only cannot avail against the other mortgagees for the purpose of saving limitation in respect of the mortgagor's suit for redemption—*Dharma v. Balmukund*, 18 All. 458; *Jwala v. Achchey*, 34 All 371; *Bhoglal v. Amritlal*, 17 Bom. 173; *Mahomed Ibrahim v. Mahomed Ismail*, 5 Lah. L.J. 111, A.I.R. 1921 Lah. 196, 79 I.C. 294. See Note 209 under sec. 21

Receiver :—A receiver of a partnership firm appointed for collecting its outstanding and doing all things necessary for the realisation and preservation of its assets, may be a person authorised to make an acknowledgment binding on the firm, if the acknowledgment was necessary for the preservation of the partnership assets—*Lakshumanan Chetty v. Sadayappa Chetty*, 35 M.L.J. 571, 48 I.C. 179. A receiver of an insolvent's estate appointed under the C. P. Code can give a valid acknowledgment, in as much as the ownership vests in him and he can deal with it as owner—*Paramasivan v. Aristotle*, 5 L.W. 222, 38 I.C. 169.

Partners :—See Notes under sec. 21.

Hindu woman :—It was formerly held that a Hindu woman in possession of her limited interest in the estate of her deceased husband or father, could not make an acknowledgment so as to extend the period of limitation as against the reversioners. Her acknowledgment did not bind the estate or the reversioners—*Soni Ram v. Kanhaiya*, 35 All. 227 (235) (P.C.) (affirming on appeal *Shib Shankar v. Soni Ram*, 32 All. 33); *Mohini Mohan v. Sarat Sundari*, 86 I.C. 353, A.I.R. 1925 Cal. 862. But these cases are no longer good law in view of the new sub-section (3) (a) of sec. 21, which expressly lays down that an acknowledgment or payment made by the widow or other limited owner shall be a valid acknowledgment or payment as against a reversioner. See Notes to sec. 21 under heading "Change"

Legal Practitioner :—An acknowledgment by a legal practitioner will be a valid acknowledgment to bind his clients. An admission made by a pleader on behalf of his client in a memorandum of appeal in a case not *inter partes* that a certain decree was a subsisting decree and capable of execution, will amount to an acknowledgment so as to give a fresh starting point of limitation for execution of such decree—*Hingon v. Mansa*, 18 All 384. A letter from defendants' attorney to plaintiffs' attorney to the effect that the defendants were willing to pay the rent in question in case the plaintiff could show a good title, was held to be a sufficient acknowledgment—*Rungo Lall v. Wilson*, 26 Cal. 204

Ex-Agent :—Acknowledgment signed by defendant's ex-agent whose agency has terminated to the knowledge of the plaintiff, cannot prevent the operation of limitation—*Dinomoyi v. Luchmiput*, 6 C.L.R. 101 (P.C.). But if the termination of agency (by death of the master) had been unknown to the plaintiff, the acknowledgment made by the gomasta after

the death of the master would be valid and would save limitation—*Ebrahim v. Chunilal*, 35 Bom. 302, 10 I.C. 888, 13 Bom. L R. 264.

Director:—An acknowledgment made by one of the directors of the company who does the ordinary acts necessary in the conduct of the business on behalf of the company is a sufficient acknowledgment—*Amulya v. Coral Engineering Works Ltd.*, 33 C.W.N. 833 (834), 115 I.C. 177, A.I.R. 1929 Cal. 155.

191. Execution-proceedings—Explanation III has been added to set at rest the conflict of decisions which existed as to the question whether this section under the old Act applied or not to execution-proceedings. The Madras High Court had held that this section was not applicable to applications for execution, while the other High Courts held the contrary view. See *Sreenivasachariar v. Ponnu-sami*, 28 Mad 40; *Rama v. Venkatesa*, 5 Mad 171 (F.B.); *Brojo v. Gaja*, 6 C.L.J. 141; *Kally v. Heera Lal*, 2 Cal 468; *Ramhit v. Satgur*, 3 All 247 (F.B.); *Trimbuk v. Kashi Nath*, 22 Bom 722

The following are instances of acknowledgment:—An application in writing by a judgment-debtor asking the decree-holder to postpone the sale and allow him time to make some arrangement for paying off the debt—*Ramhit v. Satgur*, 3 All 247 (F.B.); *Toree v. Mahomed*, 9 Cal. 730; *Norendra v. Bhupendra*, 23 Cal 374 (387); *Subbalakshmi v. Ramanujam*, 42 Mad. 52, *Venkatray v. Biju Singh*, 10 Bom. 108; a joint application by the decree-holder and the judgment-debtor stating on the one hand, that the former received a certain sum in part-payment of the decretal amount, and on the other, that there was a certain balance due from the judgment-debtor under the decree—*Mahammad v. Prayag*, 16 All 228, the payment of part of the judgment-debt by the judgment-debtor, with an acknowledgment of liability by his pleader—*Trimbuk v. Kashi Nath*, 22 Bom 722, a petition by the judgment-debtor for the enlargement of time for the payment of the decretal amount—*Ram Coommar v. Jakur*, 8 Cal. 716; an application by the decree-holder for certifying certain payment in satisfaction of a redemption-decree—*Bacharaj v. Babaji*, 38 Bom. 47; *Eusuffzeman v. Sanchis*, 43 Cal 207; a statement by the decree-holder in his execution application that he had received a certain sum from the judgment-debtor—*Eusuffzeman v. Sanchis*, 43 Cal 207, 20 C W N 272; an agreement made between the judgment-debtor and the decree-holder in course of the execution-proceedings—*Fatch v. Gopal*, 7 All 424, an endorsement of part payment of the decretal amount made on the decree by the judgment-debtor—*Janki v. Ghulari*, 5 All 201. A compromise to have the rest of the decree executed at a future time amounts to an admission on the part of the judgment-debtor and entitles the decree-holder to a fresh period from the date of the compromise—*Bhadeswar v. Anand Behari*, 6 I.C. 366. If in a petition of insolvency filed by the judgment-debtor the judgment-debt is specified, that would amount to an acknowledgment—*Rampal v. Nand Lal*, 16 C W N 346, 13 I.C. 603. Where the judgment-debtor expressly admitted that there was an instalment decree in favour of the decree-holder, that several instalments had already been paid, that

the instalment for *Poush* remained unpaid but as it had not become due, the decree-holder was not entitled to proceed with the execution, held that this was a sufficient acknowledgment—*Pareesh Nath v. Ismail*, 26 C.W.N. 486, 34 C.L.J. 195, 64 I.C. 993. An acknowledgment by the judgment-debtor may save limitation against the auction-purchaser, but such acknowledgment, if made after attachment, cannot prevail against the auction-purchaser who is entitled to have the property purchased by him in the condition in which it was at the time of the attachment—*Rajeswari v. Binode*, 22 C.W.N. 278, 44 I.C. 533.

An acknowledgment of liability in writing by some of the judgment-debtors within three years from the date of the last application for execution would save limitation as against the persons making the acknowledgment—*Ban Behary v. Jnanendra*, 22 I.C. 709, *Chandra v. Ramdin*, 16 C.W.N. 493, 13 I.C. 702

This section does not apply to section 48, C. P. Code, because the term of 12 years prescribed by that section is not strictly speaking a "period of limitation," and therefore an acknowledgment cannot give the decree-holder a fresh period of 12 years for the execution of his decree—*Mohant Krishna Dayal v. Sakina*, 1 P.L.J. 214, 34 I.C. 27.

192. Acknowledgment under previous Act—Suit under present Act—The law to be applied is the law in force at the time when the plaintiff's suit is brought and not the law in force at the time when the acknowledgment was made. An acknowledgment of a mortgage was made by an agent in 1868 while the Act of 1859 was in force and the suit on the mortgage was brought in 1909, under the present Act. It was held that although under the Act of 1859 an acknowledgment by an agent was not a valid one, still that Act would not apply, but the Act in force at the time when the suit was instituted; that is, the Act of 1908 would be applicable, and the acknowledgment by an agent being a valid acknowledgment under this Act would save limitation—*Zaibunissa v. Maharaja of Benares*, 34 All 109; *Soni Ram v. Kanhaiva Lal*, 35 All. 227 (P.C.), 19 I.C. 291.

But where the right of action was barred before the new Act came into force, it could not be revived by the new Act. Thus, where a claim was barred before 1871 because an acknowledgment by an agent could not keep the claim alive, it cannot be revived by the Acts of 1871 and 1877 by reason of the fact that those Acts make an acknowledgment by an agent valid. Therefore a suit brought on the claim in 1880 is barred—*Dharma v. Govind*, 8 Bom. 99; *Narayan v. Govind*, 29 Bom.L.R. 1563, A.I.R. 1928 Bom. 28 (31), 107 I.C. 60. See also *Dhondi v. Lakshman*, 31 Bom L.R. 1287, A.I.R. 1930 Bom 55 (56).

20. (1) Where interest on a debt or legacy is,

Effect of payment of interest as such or of part payment of principal.

before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf,

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made :

Provided that, save in the case of a payment of interest made before the 1st day of January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the same.

(2) Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-section (1).

Effect of receipt of
produce of mortgaged
land.

Explanation—Debt includes money payable under a decree or order of Court.

Change —The proviso to sub-section (1) has been substituted, by the Indian Limitation Amendment Act, 1927 (Act I of 1927), in place of the old proviso which stood as follows —

“Provided that, in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same ”

In other words, while under the old law, the handwriting of the payer was necessary in case of part payment of the *principal* alone, under the new law, the handwriting of, or a writing signed by, the payer shall be necessary in the case of payment of *interest* also, if made on or after the 1st January, 1928.

This amendment has been made in pursuance of the following recommendations of the Civil Justice Committee : “With regard to section 20, we think that the provisions of clause (1) as they stand lead to a number of frivolous suits long after the period of limitation prescribed. It is easy in the first place for the plaintiff to say that within the time fixed the defendant paid him one rupee and two rupees as interest. He attempts to prove such payment by adducing oral evidence which takes up much valuable time, but ultimately the suit is, in most cases, dismissed. There is no reason why the payment of interest should stand on a different footing from the part payment of the principal of a debt. In the latter case the proviso to clause (1) enacts that the fact of payment should appear in the handwriting of the person making the same. It seems to us that the payment of interest should also be subject to the same conditions as the part-payment of principal. There does not seem to be any reason for providing for payment of interest as such, so long

as any portion of the sum paid can be appropriated for that interest. Moreover, having in view our recommendation that the payment of interest should be also in writing, the words 'as such' would lose much of their importance"—*Civil Justice Committee Report*, p. 489.

193. Sections 19 and 20.—Section 20 does not prevent the operation of section 19, and the two sections are not mutually exclusive. These sections cannot be treated as one general and the other special. Therefore, a payment though it may be ineffectual as a payment under sec. 20 may nevertheless be treated as an acknowledgment under section 19, if it fulfils the requirements of that section. Moreover, section 19 only operates against the person who makes the acknowledgment, but sec. 20 makes the part-payment good in favour of any suit on that liability. Further, an acknowledgment under section 19 need not be addressed to the person entitled, but a part-payment under sec. 20 must be made only to the person entitled to payment—*Venkatakrishniah v Subbarayudu*, 40 Mad. 698. An acknowledgment must be made by the person against whom the right is claimed, but in the case of a payment of interest or principal all that is required is that it should be made by a person liable to pay the debt. Further, the principle on which payment towards a debt is differentiated from mere acknowledgment is that such payment enures to the benefit of all who are liable to pay, which cannot be said of a mere acknowledgment made by one of the persons liable to pay—*Narasinha v. Ibrahim*, 56 M.L.J. 630, A.I.R. 1929 Mad 419 (420, 421), 118 I.C. 302.

194. Prescribed period—The word "prescribed" means the period prescribed in the first schedule, and not the period within which the plaintiff may bring his suit. Therefore, if interest is paid *after* the expiry of the period of limitation, though before the plaintiff can bring a suit owing to the intervention of the vacation, it is of no avail—*Debendra v. Kartic*, 55 Cal. 1210, A.I.R. 1929 Cal. 68, 114 I.C. 483. Compare the cases cited in Note 176 to sec. 19, under heading "Acknowledgment made during holidays." The expression "prescribed period" means not the period prescribed for the repayment of the loan, but the period prescribed for the limitation of the suit, because in ordinary cases no debtor would make a payment before the time fixed for repayment of the loan—*Ramsebuk v. Ramlal*, 6 Cal. 815 (dissenting from *Tariney v Sheikh Abdur*, 2 C.L.R. 346). It means that the interest must be paid before the debt is barred—*Venkataratnam v. Kamayya*, 11 Mad. 218.

195. Payment :—This section does not specify any particular mode or form of payment. Where the common agent of joint debtors paid interest on the joint debt out of joint funds under express instructions contained in the instrument of his appointment, and this payment was relied upon by the plaintiff (one of the joint debtors) in a suit for contribution against the defendant (another joint debtor), it was held that this payment was clearly a payment in exoneration *pro tanto* of the liability of the plaintiff and such as is contemplated by this section—*Sukhamoni v. Ishan*, 25 Cal. 844 (P.C.).

A payment may be made not only in the current coin of the realm but in any other medium that the creditor may choose to accept—*Ragho v. Hari*, 24 Bom. 619. It is not necessary that the payment of a debt should be actually made in money. The payment may be in goods or even by a settlement of amounts between the parties, provided that the payment must be of such a nature that it would be a sufficient answer to a suit. The test to be applied is, whether the payment that has been made is of such a nature that it would be a complete answer to a suit brought by the creditor to recover the amount—*Kariyappa v. Rachapa*, 24 Bom. 493; *Mylan v. Annavi*, 29 Mad 234; *Kollipara v Maddulla*, 19 Mad 340; *Narsoomal v Athmal*, 9 S L.R 27, 30 I.C. 51. Thus, a payment made in goods will be sufficient if that is the intention and agreement—*Hart v. Nash*, (1835) 2 Cr M & R 337, *Hooper v Stephens*, (1836) 4 A & E. 71. There may be a part payment by a mere settlement of accounts—*Amos v. Smith*, (1862) 31 L J Ex. 423; *Maber v. Maber*, (1867) L.R 2 Ex. 153. If by agreement money is paid by the debtor on behalf of the creditor to a third person, that may be a sufficient payment as between the debtor and the creditor—*Worthington v Grimsditch*, (1845) 7 Q B. 479. Thus, a payment made by the mortgagors by means of a sale by the mortgagors to the mortgagees of a certain property other than that covered by the mortgage in suit is a good payment within the meaning of this section—*Raushan v Kanhaiya*, 41 All. 111 (112), 47 I C. 845. The payment may be made in the shape of a new bond passed for interest—*Doming v Antone*, 1889 P J 39. So also, the receipt of produce of land was held to be a payment of interest where the payee of a promissory note had been put into possession under an agreement that the produce of land should be taken as interest—*Mylan v Annavi*, 29 Mad. 234. But a plaintiff cannot rely on an entry made by the defendant in his own books crediting a sum to the plaintiff's account, because such an unilateral act does not amount to 'payment'—*Kollipara v Maddulla*, 19 Mad 340; *Mutnuddin v Mahammad*, 1916 P L.R 68, 31 I C. 782; *Nagappa v. Ramanathan*, (1916) 2 M W N 264, 29 I.C. 422; *Satappa v Annappa*, 47 Bom 128 (131). An entry of interest in the defendant's books even if made in the presence of the plaintiff does not amount to a payment of interest within the meaning of this section—*Ichha v Natha*, 13 Bom 338 (343); *Palaniappa v. Veerappa*, 41 Mad. 440, 34 M L.J 41. Similarly, where, subsequent to the adjustment of accounts by the defendant, he had been credited with the amounts of surplus proceeds of goods sold and with the proceeds of a hundi, such amounts were not 'payments' within the meaning of this section—*Narayan v Alencium* 6 Bom. 103.

(1844) 12 M. & W. 510, 67 R.R. 414 Hence, an agreed statement of accounts where all the items are on one side only, if the statement is signed by the party liable and is inoperative as an acknowledgment, cannot be allowed to support an action on an account stated in respect of items which are statute-barred—*Jones v. Ryder*, (1838) 4 M. & W. 125; *Nash v. Hill*, 1 F. & F. 198, 115 R.R. 897; *Guljar v. Sariman*, 36 C. 228, A.I.R. 1923 Cal. 71, 72 I.C. 692

Moneys realised in execution sale cannot be regarded as amounting to payment, because a payment relied on must be a voluntary acknowledgment, by the person making the payment, of his liability and an admission of the title of the person to whom the payment is made—*Ram Chandra v. Devba*, 6 Bom. 626; *Raghunath v. Shiromonee*, 24 W R 20; *B. v. Ikbal*, 25 W R 249.

Under this section, a payment is not a good payment unless it is made to the person entitled—*Venkata Krishniah v. Subbarayudu*, 40 Mad. (699). It must be made to the creditor or some one who is his agent. Payment to a stranger is inoperative—*Stamford Banking Co. v. Smith* [1892] 1 Q B 765. Payment made to a person who is acting as creditor's administrator, although his title is defective, is sufficient—*C. v. Hooper*, 10 Bing 480.

If there are two debts, and a payment is made by the debtor without specification of the debt towards which the payment is made, the creditor can appropriate the money towards any debt he likes. See section 20, Contract Act. But so far as the question of limitation is concerned, such appropriation by the creditor does not keep the debts alive. Under sec. 20, the payment is viewed from the standpoint of the debtor, hence the determining factor is the intention of the debtor in making the payment and not that of the creditor in appropriating it. When, therefore, the debtor makes payment to his creditor, to whom he owes two debts, the mere appropriation of the payment by the creditor to one of the debts, cannot in the absence of evidence to show the debtor's intention, save limitation in respect of that debt—*Panna Lal v. Ram Saran*, 10 Lah. 750, 116 I.C. 549, A.I.R. 1929 Lah. 288 (289), 30 P.L.R. 2. It must be proved to the satisfaction of the court that the payment was actually made. The mere statement of the creditor that he received and appropriated certain sum is not sufficient—*Ammalu v. Narayanan*, 54 Mad. 549, A.I.R. 1928 Mad. 509 (512), 111 I.C. 210.

Who can make payment:—A payment saves limitation under this section if it is made by the person liable to pay it. A purchaser of an equity of redemption is a person liable to pay the mortgage-debt within the meaning of this section; hence if under a mortgage decree for sale of the mortgaged property, to which he is a party though exempted from personal liability, he pays interest as such, such payment gives a fresh period of limitation for execution of the decree—*Asikaram v. Venkateswami*, 44 Mad. 544; *Bhuban Mohan v. Ram Gobinda*, 54 Cal. 179, A.I.R. 1926 Cal. 1218, 98 I.C. 214. A second mortgagee is a person liable to pay the first mortgagee on the ground that he can only get the property

redeeming the first mortgage—*Bolding v. Lane*, (1863) 1 DeG J & Sm. 122; *Chinnery v. Evans*, (1864) 11 H. L. Cas. 115 (135). In respect of a pro-note executed by a deceased Mahomedan, one co-heir can make payment of interest to save limitation against the other co-heirs, as the co-heir is a person *liable to pay* the interest. It is immaterial that the coheirs took the property of the deceased as tenants-in-common or that their interests are several—*Narasimha v. Ibrahim*, 56 M.L.J. 630, A I.R. 1929 Mad. 419 (420).

Payment towards debt:—Where payments were made towards a debt, but there is nothing to shew whether they had been made in respect of principal or interest, the Court is entitled to find out on the evidence for what purpose the payments were made—*Hem Chandra v. Purna Chandra*, 44 Cal 567 (571); *Arjan Mal v. Amar Singh*, 3 Lah L J 250, A I R 1921 J 33. If the payment can neither be treated as a payment towards interest nor as a part payment of principal, it is ineffectual as a payment under this section, but may be treated as an acknowledgment under section 19—*Venkatakrishna v. Subbarayudu*, 40 Mad. 698.

Payment through messenger:—Where an agent sent money through a mohurrir and then followed it up by an entry of such payment with his own hand in his account book, the payment should be treated as made by the agent and not by the mohurrir—*Sarajubala v. Sarada*, 23 C.W.N. 336, 50 I.C. 862; *Duraisami v. Krishnier*, 1919 M.W.N. 797, 54 I C 318.

195. Interest.—It means interest or any part of the interest due—*Abdul v. Mahtab*, 35 All. 378, 11 A L J 477, 20 I C 258.

Where there are several debts, and payment of interest has been made by the debtor without specification, the payment may reasonably be attributed to all the debts which are thus saved from limitation—*Hingu v. Heramba*, 13 C L J 139, 8 I C 81, *Sankaram v. Thiraviya*, 51 I C 240 (following 13 C L J 139).

197. Interest as such.—It must be interest paid *as interest* and stated to be so at the time of payment or there must be evidence from which it can be *inferred* that the debtor intended that the amount should be appropriated towards interest—*Kariyappa v. Rachapa*, 24 Bom. 493 (499); *Bitari Ram v. Kunji Singh*, 19 C.W.N. 237, 20 I.C. 857. The mere appropriation by the creditor of the payment towards interest is not an indication that the debtor intended that the money should be applied towards interest. The Limitation Act says that the debtor must make the payment of interest as such, and it is the act of the debtor which gives a fresh starting point. The creditor cannot, by his own act and without any act of volition on the part of the debtor, make a fresh starting point for limitation—*U Ba Gyi v. U Than*, 7 Rang 522, A I R 1929 Rang 339 (340), 120 I.C. 897; *Chanderpal v. Dania*, 19 I C 825, *Mahammed Abdulla v. Bank Instalment Co.*, 31 All 495; *Jago v. Mahadeo*, 59 I.C. 700; *Narsin v. Chandrasechi*, 6 O.W.N. 776, A I R 1929 Oudh 479 (480). The plaintiff must establish not only that there was payment within time but also that there was either an express intimation by the debtor or circumstances exist which make the conclusion inevitable that the payment

making the same—*Jada Ankamma v. Nadimpalle Rama*, 6 Mad. 281; *Sakharam v. Keval*, 44 Bom. 392 (397). The proviso requires not that the part-payment of the principal as such should appear in the hand-writing of the person making the payment, but that the fact of payment should so appear—*In re Ambrose Summers*, 23 Cal. 592. If the legislature had desired that there must further be recorded in the handwriting of the debtor the fact that the payment is made towards the principal, it would have inserted the words "as such" after the words "fact of payment" (in the old proviso)—*M. B. Singh & Co. v. Sircar & Co.*, 28 A.L.J. 590, A I R 1930 All. 392 (395). By the Amendment Act I of 1927, the words "fact of payment" have been changed into the words "acknowledgment of payment"

If the part-payment is made within the period of limitation, the mere fact that the writing evidencing the payment was made after the period of limitation had expired would not render such hand-writing useless for the purpose of saving a claim from the limitation bar. This section requires that the payment must be made within the period of limitation, it does not require that the writing should be made before the expiration of the period. It only requires a writing as the mode of proving the fact of payment—*Venkatasubba v. Appusundaram*, 17 Mad 92; *Ramprasad v. Bansilal*, 19 N L R 6, 71 I C 17.

199. Actual payment not necessary at the time of endorsement.—Where an endorsement of payment on a bond is sought to save the bond from limitation, it is not necessary that there should be an actual payment of money at the time of the endorsement—*Thesiger v. Srinuvasa*, 10 M L J. 25; *Lakshmi v. Ramaswamy*, 26 I.C. 754; *Ramakrishna v. Venkatasubba*, 28 I C 15. But the period is to be reckoned from the date of the payment and not from the date of endorsement of such payment—*Lakhminarasimham v. Bharata*, 9 M L T. 216, 8 I.C. 349.

200. Hand-writing of the person making the same:—The fact of part-payment of the principal of a debt (and, under the present law, of interest also) must appear in the hand-writing of the person making the payment and not in that of any other person, even though the latter may have been expressly authorised to endorse the fact of payment—*Manindra v. Kanhai*, 4 P.L.J. 365, 48 I.C. 728; *Bishen Parkash v. Siddique*, 1 P.L.J. 474, 35 I.C. 375; *Mukhi v. Coverji*, 23 Cal. 546 F.B. (overruling 23 Cal. 553 note); *Joshi Bhaishankar v. Bai Parvati*, 26 Bom. 246. A letter written and signed by the debtor along with a part-payment of principal would save limitation—*Viswanath v. Sri Ramchandra*, 17 M.L.T. 78, 27 I.C. 744; *Sakharam v. Keval*, 44 Bom. 392.

Where the endorsement of part-payment of principal was in the handwriting of a person other than the defendant, but it was signed by the defendant, it was held (prior to the Amendment of 1927) that this was not a sufficient compliance with the proviso. Where part-payment of the principal of a debt was made by a person who could write, it was

held that the whole of the endorsement recording the payment (and not the signature only) should be written by the person who made the payment—*Lodd Gobindoss v. Rukmani*, 38 Mad. 438; *Venkatkrishniah v. Subbarayudu*, 40 Mad. 698; *Nivaj Khan v. Dadabhai*, 41 Bom. 166; *Santishwar v. Lakhikar*, 35 Cal. 813 (814); *Bisheshwar v. Madho Rao*, 17 N.L.R. 40, 62 I.C. 297. But in such circumstances it was also held that although the payment was not good as part-payment of the principal within the meaning of this section, still the endorsement would amount to an acknowledgment of liability under section 19 so as to save limitation—*Venkatkrishniah v. Subbarayudu*, 40 Mad. 698; *Jaganadha v. Rama Sahu*, 17 M.L.T. 80, 27 I.C. 747. But under the present proviso as amended by the Amendment Act I of 1927, the addition of the words "or in a writing signed by" shows that it is no longer necessary (in case of a payment made on or after 1st January 1928) that the whole of the endorsement must be written by the person making the payment; it will be sufficient if it is merely signed by him, although it is written by another person.

Where the payment is made by a person who does not know how to write, the endorsement may be made in the hand-writing of a third party and the payer may subscribe his mark to the endorsement—*Ellappa v. Annamalai*, 7 Mad. 76; *Sesha Charlu v. Seshaya*, 7 Mad. 55; *Baleram v. Sobha Sheikh*, 28 C.L.J. 222, 23 C.W.N. 930 (931), 44 I.C. 516; *Jamna v. Jaga Bhana*, 28 Bom. 262. *Hari Govind v. Gangubai*, 52 Bom. 356, A.I.R. 1928 Bom. 417 (418), 109 I.C. 702. And the fact that the description of the mark is written by another person who did not write the endorsement is immaterial, because the mark is complete even without the description—*Hari Govind*, *supra*. Where no such mark is affixed, the provision of law has not been complied with—*Baleram v. Sobha Sheikh*, (*supra*); *Joshi v. Bai Parvati*, 26 Bom. 246; *Ganga Ram v. Nikka*, 29 P.L.R. 438, A.I.R. 1928 Lah. 157. The Patna High Court however holds that, if the person making the payment is illiterate, it is sufficient if the endorsement is made by another person on his behalf, and it is not necessary for the payer to make any mark or thumb-impression under the endorsement—*Sri Ram v. Kashi Mollah*, 2 P.L.T. 355, 62 I.C. 644 (645), A.I.R. 1921 Pat. 476. But this is no longer correct by reason of the words "in a writing signed by the person" etc., added by the Amendment Act of 1927.

The words "person making the same (payment)" do not necessarily mean the person who physically hands over the money; thus, if part-payment of principal is made by an agent of the debtor, but the money is sent through a peon with a slip signed by the agent, it is the agent who makes the payment, and since the fact of the payment appears in the hand-writing of the agent (in the slip) it is sufficient to save limitation. It is not necessary that the fact of payment should appear in the hand-writing of the peon who physically hands over the money. Similarly, if an agent of the debtor sends a cheque or notes by post, the person actually making the payment and physically handing over the notes or

cheque is the postman. But certainly the postman is not the person who "makes the payment" within the meaning of this section, and his handwriting is not required. The postman or the peon is merely a conduit pipe through which the money passes to the creditor, the duly authorised agent who sent the cheque or notes being regarded as the person who made the payment—*Ramkumar v. Nanuram*, 53 Cal. 163, 94 I.C. 657, A.I.R. 1926 Cal. 510. A money-order coupon written by the debtor, requesting the credit of the sum sent towards the debt, satisfies the requirements of this section—*Ram Sarup v. Md. Ubaidulla*, A.I.R. 1930 All. 123.

Where two persons are liable on a debt embodied in a *Khata*, and they make payments towards satisfaction of the debt, it is not necessary that both persons should make the entries in the creditor's books. It is enough if the writing is made by the debtor paying the debt, and is signed by both the debtors, because, under this section it is sufficient if the fact of payment appears in the handwriting of the person making the same—*Devchand v. Jamshedji*, 25 Bom. L.R. 354, A.I.R. 1923 Bom. 369, 74 I.C. 302.

201. Payment by cheque.—Where a debtor paid a certain sum of money by a cheque, held that as it was a mere order for payment and not a payment itself, and did not show on its face that it was given as a part-payment of the principal, it was not sufficient to keep alive the creditor's claim under this section—*Sardar Bachittar Singh v. Jagan Nath*, 1 P.R. 1897. Where the only evidence in the hand-writing of the debtor of the part-payment of the principal of a debt, was the endorsement of a cheque to the creditor, such endorsement did not satisfy the conditions of this section—*Mackenzie v. Tiruvengadathan*, 9 Mad. 271, *Ram Chander v. Chand Prasad*, 19 All. 307. But the Calcutta High Court holds that where a cheque is signed by the debtor and addressed to the creditor in part-payment of the principal, the proviso is sufficiently complied with—*Kedar Nath v. Dinobandhu*, 42 Cal. 1043, 19 C.W.N. 724. The Allahabad High Court observes that if there is evidence that the cheque was in fact received by the creditor as payment, and his account was credited with the amount of the cheque, then of course the cheque operated as a payment to save limitation—*M. B. Singh & Co. v. Sircar & Co.*, 28 A.L.J. 590, A.I.R. 1930 All. 392 (394). If a cheque is given in part-payment of a debt, the fresh period of limitation under this section should be computed from the actual giving of the cheque, and not from the date when the Bank pays cash for it. But if a cheque is handed over to the creditor on the 5th January after banking hours, the Court will presume that the payment was made on the 6th January—*Maurice v. Morley*, 29 C.W.N. 496, 89 I.C. 508, A.I.R. 1925 Cal. 937. In England also, payment by cheque has been held to be a good payment when the cheque is honoured. See *Currie v. Misa*, (1875) L.R. 10 Ex. 153 (164) and *Turney v. Dodwell*, (1854) 3 E. & B. 136, cited in 42 Cal. 1043 at p. 1046. See also *Garden v. Bruce*, 37 L.J.C.P. 112, 3 C.P. 300. *Why* the debtor had addressed a letter to his creditor enclosing a cheque

for a certain sum and requesting that it should be placed to the credit of the loan account, it was held to be sufficient—*In re Ambrose Summers*, 23 Cal. 592.

202. Effect of payment.—In a mortgage without possession, a portion of the produce was agreed to be paid as interest. The mortgagee sub-mortgaged half his rights. The sub-mortgagee continued to receive from the mortgagor his share of the produce up to a period within six years of the present suit which was brought by the sub-mortgagee against the original mortgagee. The question arose as to whether limitation was saved as against the original mortgagee by the payment of produce to the sub-mortgagee by the mortgagor within 6 years of the suit. Held that where a debt is kept alive by section 20 (1) by payment made by a person liable to pay it, its effect is to save limitation not only against the person who makes the payment, but also to make the debt enforceable against any one liable for it, and that in this case the debt was kept alive against the original mortgagee—*Ram Chand v. Mena*, 3 P.R. 1918, 44 I.C. 213.

A payment made by the mortgagor after he had assigned one of the mortgaged properties is sufficient to keep alive the mortgage-debt against the assignee—*Krishna v. Bhairab*, 32 Cal. 1077 (1080). As the mortgagor is the debtor within the meaning of the 2nd para of this section, the payment of part of the principal by him even after his equity of redemption has been purchased by a third person in execution of a money-decree against the mortgagor, gives the mortgagee a fresh period of limitation not only against the mortgagor but also against the purchaser of the equity of redemption—*Domilal v. Roshan*, 33 Cal. 1278 (1281), following *Krishna v. Bhairab*, supra, and dissenting from *Newbould v. Smith*, (1886) 33 Ch. D. 127.

Payment of part of the mortgage-debt made by one of the mortgagors will give a fresh start of limitation to the mortgagee not only against the mortgagor making the payment but also against all the mortgagors—*Acholasundari v. Doman*, A I R 1926 Cal. 150, 90 I.C. 774; *Ghasi Khan v. Thakur*, 27 A.L.J. 446, 1929 All (381); *Roshan Lal v. Kanhaiya Lal*, 41 All 111, 47 I.C. 845, 16 A.L.J. 790; *Ibrahim v. Jagdish*, A I R. 1927 All. 209 (210). Payment of interest made by one heir of the original debtor is effectual under this section to save limitation against the other co-heirs also—*Narasimha v. Ibrahim*, 56 M.L.J. 630, A I R 1929 Mad. 419 (420), 118 I.C. 302; *Ibrahim v. Jagadish*, A I R 1927 All 209 (210), 99 I.C. 424. Payment of debt by one debtor would give the creditor a fresh period of limitation not only against the payer, but would make the debt enforceable against anyone liable for it—*Velayudam v. Valthilingam*, 24 M.L.J. 66, 17 I.C. 619. Contra—*Arjun v. Rohina*, 14 I.C. 128 (Cal.).

203. Agent duly authorised.—See notes under sec 19. Part payment by an agent of the debtor within the lawful scope of his agency is sufficient—*Jones v. Hughes*, (1850) 5 Ex. 104, *Newbould v. Smith*, (1885) 29 Ch.D. 882. The agent who can give the creditor the

benefit of sec. 20 has to act within the terms of his authority. If he exceeds his authority or does something which is not actually covered by his authority, he cannot bind the principal so as to give the creditor the benefit of this section—*Balaguruswami v. Guruswami*, 48 M.L.J. 506, 87 I.C. 989, A I.R. 1925 Mad. 703.

When an agent is authorised to pay an amount towards the total amount of the bond, the authority extends to his paying an amount towards the interest due on the bond, and is not confined to paying only towards the principal, for the 'total amount' of the bond includes principal and interest, but where the authority is specific, that is to say, where the agent is authorised only to pay towards the principal, the agent will not be justified in paying towards interest—*Karuppan v. Muruthanayagam*, 51 M.L.J. 472, 98 I.C. 162, A I.R. 1926 Mad. 1176. The authority referred to in this section is an authority to make the payment. It is not necessary under this section that the agent who makes the payment must also be authorised to make the endorsement or get the same done by another. This section assumes that the authority to make the payment carries with it the authority to make the endorsement—*Venkateswarulu v. Suryaprakasam*, 53 M.L.J. 555, A I.R. 1927 Mad. 959, 105 I.C. 475.

The guardian of a minor appointed under the Guardians and Wards Act is an agent authorised to make a part-payment of the principal of a debt due by the ward, if it is shown that the guardian's act is for the protection and benefit of the ward's property—*Annappaganda v. Sangradyapa*, 26 Bom. 221 F.B. (overruling *Ranmatsingh v. Vadilal*, 20 Bom. 61); such a guardian is also an agent duly authorised to pay interest—*Narendra v. Rai Charan*, 29 Cal. 647. A natural guardian is also an agent duly authorised to pay principal and interest on behalf of the ward. See section 21, which generally authorises all lawful guardians to make payments and acknowledgments. The case of *Tilak Singh v. Ghutta Singh*, 26 All. 598 (where it was held that a natural guardian was not competent to pay interest so as to save the bar of limitation) was decided under the Act of 1877, and is no longer good law in view of sec. 21 of the Act of 1908.

It is not necessary that the agent should be authorised in writing to make a payment, nor that he should be expressly authorised; it is sufficient that the authority is implied—*Burimohan v. Rudra Perdash*, 17 Cal. 951. Thus, where it is agreed between a third person and the promisor that the former would discharge the latter's debt evidenced by a promissory note to the promisee in respect of principal and interest, and it is clear from the promisor's evidence that he left it to the third person to do so, an implied authority from the promisor to the third person to pay the interest on his behalf as it becomes due is established, and any payment made by the third person saves limitation against the promisor. Moreover, as the third person was under a direct obligation to satisfy the debt, the payment was made by a "person liable to pay it"—*National Bank of Upper India v. Bansidhar*, 57 I.A. 1, 6 O.W.N. 1136, 34 C.W.N. 145 (149), A I.R. 1929 P.C. 297. The words "duly authorised" include-

authority given by law, as well as authority given by act of parties. Thus, where the *Karta* of a joint Hindu family purporting to act for himself and his minor brother made part-payment of interest due on a debt contracted by himself and his father for joint family purposes, it was held that in making the payment the *Karta* acted both for himself and his minor brother, and was an agent duly authorised to make the payment—*Chandra Kanta v. Behari Lal*, 31 C.L.J. 7, 52 I.C. 436. The *Karta* of a joint family is the agent of the entire family duly authorised to make part-payments on behalf of the family—*Bajrangi Prasad v. Kesho Singh*, 6 Pat. 811, A.I.R. 1928 Pat. 156 (158). A payment towards principal and interest made by the manager, and an endorsement on the pro-note (executed by the manager for an amount borrowed for the expenses of the family) in his hand-writing and over his signature had the effect of extending the period of limitation as against the junior members also, though the payment and endorsement did not purport to have been made and signed by him as manager—*Thankammal v. Kunhamma*, 53 I.C. 878, 37 M.L.J. 369. Under the new sub-section (3) (b) of sec. 21, the manager of a joint family is expressly authorised to make payment on behalf of the family, and such payment will save limitation.

A mortgagee who is required under his mortgage document to pay a portion of the consideration to a creditor of the mortgagor in discharge of the amount due to the creditor for principal and interest on a bond, cannot, by making payment of interest only to the creditor, keep the debt alive, his authority being to pay off both principal and interest—*Alagappa v. Subramania*, 26 M.L.J. 509, 23 I.C. 810. A person who acts as solicitor to the mortgagor and mortgagee can make payment of interest to the mortgagee on behalf of the mortgagor, and such payment keeps alive the mortgage—*Bradshaw v. Widdington*, [1902] 2 Ch. 430. Where a firm owes a debt, and on one of the partners retiring, the remaining partners undertake to pay it, the payment of interest by the remaining partners to the creditor keeps alive the debt against the retiring partners, whether the creditor was aware of the agreement or not, provided there has been no novation of contract—*Tucker v. Tucker*, [1894] 1 Ch. 724.

The payment of part of a debt by a receiver appointed to the estate of the debtor will keep the debt alive, since the receiver is to be deemed as an agent of the debtor—*Chunnery v. Evans*, (1864) 11 H.L. Cas. 115; *In re Hale, Lilley v. Foad*, [1899] 2 Ch. 107.

Court as 'Agent' —On 29th September 1912 the final decree for sale was passed in a mortgage suit for Rs. 3,500 and odd. Two of the mortgaged properties were afterwards acquired under the Land Acquisition Act and the compensation money of Rs. 3,400 was deposited in Court and paid out to the decree-holder on 11th August 1914. At the time of payment the Judge signed a paper showing that the amount was paid to the decree-holder in his presence and through the Court. On 10th August 1917 (that is, within three years from the payment but more than three years after the decree) the decree-holder filed an execution applica-

tion for the balance due. *Held* that the application was not barred as the payment made by the Court in 1914 gave a fresh start for limitation. When a Court in discharge of its duty pays out money belonging to the judgment-debtor to the decree-holder, it is a duly authorised agent of the judgment-debtor to make the payment on his behalf, the fact of payment appearing in the paper written and signed by the Judge—*Govindasami v. Dasai Goundan*, 44 Mad. 971, 41 M L J 423. If a debtor's assets are so placed either by his own act or by operation of law that if some other than he alone can release them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant—*Govindasami v. Dasai*, *supra* (per Coutts-Trotter J.). But where a certain amount was deposited in Court to the credit of a certain person V, and this sum being attached by one S who was suing V's son on a pro-note executed by V, it was paid over to him by the Court, *held* that this payment by the Court could not be construed as one made by the duly authorised agent of V's son. The mere fact that a Court holds moneys belonging to a debtor's father cannot constitute that Court the agent of the debtor himself. There must be communication with the son—*Venkatasubbaya v. Seshayya*, 51 M L J. 610, A I R 1927 Mad 80, 98 I C. 571.

Principal debtor and surety:—Payment by the principal debtor does not give a fresh starting point against the surety, even in the absence of prohibition by the surety against the payment of interest by the debtor on his account—*Gopal v. Gopal*, 28 Bom 248; *Sami Aiyangar v. Laxmi*, 21 M L J. 455, 9 I.C. 8; *Seth Abde Ali v. Askaran*, 20 N L R 140, A I R. 1924 Nag 411. See Note 210 under sec 21. Even though the interest was paid with the knowledge and consent of the surety and at his request, it does not keep alive the remedy against the surety unless there is evidence that such payment was made on behalf of the surety. The period of limitation as against the surety therefore runs from the date of the promissory note—*Brojendra Kishore v. Hindusthan Co-operative Insurance Ld*, 44 Cal 978, 21 C W N 482, 25 C.L.J. 238, 39 I.C. 705. The liability of the principal debtor and the liability of the surety are distinct and separate, although arising out of the same transaction, a payment by one person cannot therefore keep alive the remedy against the other—*Ibid*. In England, however, the law is otherwise, and there it is held that the payment of the interest or payment of the principal by the principal debtor will keep alive the debt as against the surety. The principal debtor making the payment is in effect the agent of the surety to make the payments which he made—*Lindsell v. Phillips*, (1885) 30 Ch.D. 291; *Lewin v. Wilson*, (1886) 11 App Cas 639.

204. Sub-section (2)—Scope:—Sub-section (2) is meant to extend the time for a suit by the mortgagee to recover a debt secured by a usufructuary mortgage, and does not apply to a suit for redemption

by the mortgagor. The period provided for a suit for redemption of a usufructuary mortgage can be extended by an acknowledgment of liability made in writing under sec. 19, but it is not intended that it should be extended indefinitely by payments in the shape of receipt of rent or produce by the mortgagee—*Kallu v. Holki*, 18 All. 295; *Anwar v. Lalmir*, 26 All. 167 (169); *Khilanda v. Jhinda*, 37 P.R. 1883 (at p. 115); *Piroze Khan v. Karhaiya Ram*, 6 Lah. L.J. 194, 78 I.C. 617, A I R. 1924 Lah. 484; *Bhagwan v. Madhavi*, 46 Bom 1000, 24 Bom. L.R. 713. Receipts by a mortgagee in possession of the usufruct of the mortgaged property after the mortgage-decree is passed are treated as payments to the mortgagee under this section for the purpose of limitation, but such receipts cannot be held to come under the category of payment of 'money payable under the decree' within O. 21, r 2, C P. Code—*Vaidhinadasamy v. Somasundram*, 28 Mad. 473 (478)

Receipt of rent or produce :—Where the mortgagee is in possession of the mortgaged land and receives the produce of the land in lieu of interest, such receipt of produce must be deemed to be payment of interest as such within the meaning of this section, and limitation would begin to run from the date of the last of such payments—*Vithoba v. Balkrishna*, 45 Bom. 1206; *Indrajit v. Gajadhar*, 35 All. 270, 19 I.C. 238. Where a property was usufructually mortgaged, and then the mortgagee executed a lease of the property in favour of the mortgagor, under which the mortgagor was to pay the Government revenue out of the rent, and to pay the balance of the rent to the mortgagee, held that the payment of Government revenue by the mortgagor amounted to a receipt of rent by the mortgagee, within the meaning of sub-section (2)—*Eressa Menon v. Abdul Rahman*, 51 M L J 378, A I R 1926 Mad 1061, 97 I.C. 941. Where a simple mortgage was executed in favour of a mortgagee, and subsequently a usufructuary mortgage was executed in favour of the same person but by the terms of the usufructuary mortgage the usufruct of the mortgaged property was given only to satisfy the interest due on the usufructuary mortgage and not the interest due on the simple mortgage, the enjoyment of usufruct could not be said to amount to payment of interest under the simple mortgage—*Anpurna v. Ram Padarath*, 49 All. 430, A.I.R. 1927 All. 417, 100 I.C. 670.

This sub-section does not refer expressly to the intention of the party who receives the rent or produce, and can be construed to apply wherever the mortgaged land is in the possession of the mortgagee. In such event the receipt of the rents and produce may be deemed a payment for the purpose of sub-section (1)—*Bama Charan v. Nimai*, 35 C.L.J. 58, A I R 1922 Cal 114. Receipt of the produce of land under a deed of mortgage required to be, but not, registered, cannot be deemed to be a payment for the purpose of this section because the deed is not admissible to prove that the rents were received as interest—*Pichandi v. Kandasami*, 7 Mad 539; *Balaprasad v. Bholanath*, 9 N.L.R 140, 21 I.C. 281; *Venkaji v. Shidhramapa*, 19 Bom 663. Certain Vatan lands were mortgaged with possession. On the death of the mortgagor in

1901, the mortgage became void under sec. 5 of the Hereditary Officers' Act, 1874. The mortgagee however remained in possession till 1914 when the mortgagor's son took possession. The mortgagee thereupon sued in the same year to recover the mortgage amount. It was held that in as much as the mortgage became void in 1901, the possession of the mortgagee thereafter was only the possession of a trespasser, and the receipt of produce by him would not save limitation, as the lands were no longer 'mortgaged lands' within the meaning of sub-section (2) of this section. The suit was therefore barred—*Krishnaji v. Kashim*, 44 Bom. 500, 57 I.C. 76.

205. Judgment-debt :—There was a conflict of decisions as to whether this section under the old Act applied to judgment-debts. The Calcutta and Madras High Courts held that the word 'debt' did not include judgment-debts—*Kally Prosonna v. Heera Lal*, 2 Cal. 468; *Mungal v. Shama*, 4 Cal. 708; *Kader Buksh v. Gour*, 6 C.W.N. 766; *Periasami v. Krishna*, 25 Mad 431; *Kuppusami v. Rangasami*, 27 Mad. 608; the Allahabad and Bombay High Courts held that it applied to judgment-debts—*Roshan v. Matadin*, 26 All 36; *Parmanandas v. Vallabdas*, 11 Bom. 506. This conflict has now been removed by the Explanation added to this section.

The Explanation lays down that the word 'debt' includes money payable under a decree. A decree means not only a final decree capable of execution but also a preliminary decree for sale, and such a preliminary decree constitutes a debt payable by the judgment-debtor within this Explanation. The time may be extended for an application for a final decree either under sec. 19 or sec 20 in a fit case. But the payment in order to extend time must satisfy the requirements of sec. 20, i.e., it must be attested by some writing by the hand of the person making the payment—*Baldeo Sahai v. Jafar*, 49 All. 147, A.I.R 1927 All. 159, 98 I.C. 818.

The Calcutta High Court has in some cases expressed the view that an *uncertified* payment or adjustment towards a decree will not operate to prolong the period of limitation provided for an application for execution of the decree—*Bireswar v. Ambika*, 45 Cal. 630 (633); *Kutabulla v. Durga Charan*, 16 C.W.N. 396 (397). But in other cases of the same High Court it has been held that if a payment towards the decree has been made within the period of limitation, the fact that it has not been certified is immaterial. The practice in this country is that the decree-holder certifies the part payments in the application for execution and thereupon the Court, having recorded the whole of the petition, directs execution to issue for the balance. This is the usual mode of proceeding, and it is not usual that a separate petition is filed merely certifying the part satisfaction of the decree. There is no period of limitation fixed within which the decree-holder must certify, and therefore the decree-holder can certify the part-payments at any time; and if the part-payment be within time to prevent the decree from being barred, then execution can issue for the balance—*Lakhi Narain v. Felamani*, 20

C.L.J. 131, 27 I.C. 11; *Jolim Chand v. Yusufali*, 54 Cal. 143, A.I.R. 1925 Cal. 1012. This is also assumed in *Jatindra Kumar v. Gagan Chandra*, 46 Cal. 22, 45 I.C. 903. The same view is taken by the Madras and Allahabad High Courts—*Masilamoni v. Sethusami*, 41 Mad. 251, 254 (following 20 C.L.J. 131); *Rajam Aiyar v. Anantharathnam*, 29 M.L.J. 669, 31 I.C. 318; *Narayana v. Kunhi Raman*, 20 L.W. 190, 82 I.C. 743, A.I.R. 1925 Mad. 131; *Badri Narayan v. Kunj Behari*, 35 All. 178, 18 I.C. 731 (732); *Kishen Singh v. Aman Singh*, 17 All. 42; *Roshan Singh v. Mata Din*, 26 All. 36. (In one case, however, the Allahabad H. C. takes a contrary view—*Chattar Singh v. Amir*, 38 All. 204, at p. 209). But an uncertified payment towards the decree must satisfy the requirements of sec. 20 (e.g., the payment must be endorsed on the back of a certified copy of the decree); otherwise the decree cannot be saved—*Narayana v. Kunhi Raman* (supra). In *Jatindra Kumar v. Gagan Chandra*, 46 Cal. 22 (24), 45 I.C. 903, the Calcutta High Court has laid down that if a part-payment is made in satisfaction of the decree within three years of the decree, (even though the payment is not endorsed by the judgment-debtor), and then an application for execution of the decree together with an application for certifying the payment is made within three years from the date of the payment, the payment would give a fresh starting point for limitation, being a step-in-aid of execution within the meaning of Article 182 (5), and consequently the application for execution would be within time. But the Madras High Court disapproves of this ruling on two grounds, viz., that the part-payment is satisfaction of the decree not being endorsed upon the decree by the judgment-debtor did not satisfy the requirements of sec. 20, and consequently it could not save limitation, and secondly, the payment cannot be regarded as a step-in-aid of execution, for Article 182 (5) clearly lays down that it is the application for certifying the payment and not the payment itself that can be considered as a step-in-aid of execution; consequently, the application for certifying the payment being made more than three years after the date of the decree, the execution was barred—*Narayana v. Kunhi Raman*, (supra).

21. (1) The expression "agent duly authorized in this behalf" in sections 19 and 20, shall, in the case of a person under disability, include his lawful guardian, committee or manager, or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment or make the payment.

Agent of person under disability.

(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a pay-

Acknowledgment or payment by one of several joint contractors, etc.

ment made by, or by the agent of, any other or others of them.

(3) *For the purposes of the said sections—*

(a) *an acknowledgment signed, or a payment made, in respect of any liability, by, or by the duly authorised agent of, any widow or other limited owner of property who is governed by the Hindu law, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability; and*

(b) *where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorised agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family.*

Change :—Sub-section (3) has been newly added by the Indian Limitation Amendment Act I of 1927, in pursuance of the following recommendations of the Civil Justice Committee: "It will save considerable unnecessary litigation and prevent vexatious pleas if limited owners under the Hindu law, and also the *karta* or manager of a joint Hindu family are enabled to make acknowledgments and payments so as to attract the provisions of sections 19 and 20. Conflicting views are held with reference to the power of a widow to make an acknowledgment binding any interest excepting her own. A limited owner like a Hindu widow fully represents the estate for many purposes; a judgment properly obtained against her will constitute the subject matter of the suit *res judicata* in a suit by the ultimate reversioner. There appears to be no reason why in the normal course of her administration of the estate of the last male owner she shall not have authority to acknowledge a debt."—*Civil Justice Committee Report*, p. 489.

206. Lawful guardian :—In an earlier case of the Madras High Court, it was held (by a single Judge) that the expression "lawful guardian" was not limited to a guardian appointed by the Court, but included any person who was lawfully acting as guardian though not legally appointed as such, and was acting for the benefit of the minor—*Tirupayya Gangayya v. Ramaswamy*, 24 M.L.J. 428, 19 I.C. 362. But this case has been disapproved of by a Division Bench, holding that a *de facto* guardian is not a 'lawful guardian' within the meaning of this section and has no authority to acknowledge a debt—*Ramasamy v. Kasinatha*, 1927 M.W.N. 356, A.I.R. 1928 Mad. 226 Under the Hindu

Law, in the absence of the father, the mother is entitled to be the guardian of her infant sons, in preference to their brother; and a payment made by the brother of an infant judgment-debtor towards the decree, while their mother is alive, cannot be said to have been made by a lawful guardian—*Bireswar v. Ambika*, 45 Cal. 630. Under the Mahomedan Law, a father's brother is a guardian of the *person* (and not of the *property*) of the minor nephews and nieces, and a payment made by him of interest on a debt due by his deceased brother (the minors' father) cannot save limitation so as to keep the debt alive against the minor daughters of the deceased brother—*Yagappa v. Mahomed*, 9 L B R. 78, 40 I.C. 858. So also, a mother, not being a guardian, under the Muhammadan Law, of the *property* of her minor son, is not a lawful guardian, and cannot sign an acknowledgment on behalf of the minor—*Chanan v. Wadhu Ram*, 1917 P L.R. 61, 42 I.C. 17.

207. Partners :—This section does not mean that no payment or acknowledgment by a co-partner will be deemed as an acknowledgment or payment made on behalf of the other partners and binding on them. The word "only" in sub-section (2) is not to be treated as a surplusage. The meaning of this word is that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partners; but if it can be shown that he had power to make the acknowledgment on behalf of himself and his co-partners, the acknowledgment will then of course be binding on them all—*Gadu Bibi v. Pursotom*, 10 All 418; *Premji v. Dossa Doongersay*, 10 Bom. 358. The mere fact that persons are partners does not make one partner liable under an acknowledgment by another; but if the acknowledgment is done in the course of partnership business, it is binding on the others—*Debi Dayal v. Baldeo*, 26 A.L.J. 1036, A I R 1928 All 491 (492), 111 I.C. 143. Compare sec. 251, Contract Act. "Each partner, if he does any act *necessary for*, or *usually done*, in carrying on the business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose." Where a Hindu joint family carries on a business, the members of the family are in the position of partners in regard to persons dealing with that business, and an acknowledgment of liability made by a member in the usual course of the partnership business, is binding on the other members of the family as partners and extends the period of limitation—*Debi Dayal v. Baldeo*, supra. It is not necessary, that a co-partner shall be *specially* empowered to make an acknowledgment or payment on behalf of his other co-partners, in order to bind them. In the absence of direct evidence that a co-contractor or partner was authorised to make an acknowledgment or payment on behalf of the others, such authority can be *inferred* from other surrounding circumstances such as the position of the other co-contractors or partners in the business, though it cannot be laid down which circumstances should be deemed sufficient to warrant the inference—*Veeranna v. Veerabhadraswami*, 41 Mad 427 (F.B.), 34 M.L.J. 373 (overruling *Sheikh Mohideen v. Official Assignee*, 35 Mad. 142, K. R. V.

Firm v. Seetharamaswami, 37 Mad. 146, and *Valasubramania v. Ramathanan*, 32 Mad. 421); *Rala Singh v. Bhagwan Singh*, 2 Rang. 367, 84 I.C. 391; *Mahadeva v. Ramakrishna*, 50 M.L.J. 67, 92 I.C. 653, A.I.R. 1926 Mad. 114. The question whether an acknowledgment made by one partner was impliedly authorised by others, depends upon whether it was an act necessary for or usually done in carrying on the business (sec. 251, Contract Act)—*Bengal National Bank v. Jatindra*, 56 Cal. 556, 33 C.W.N. 412 (415). In a going mercantile concern such agency is to be presumed as an ordinary rule—*Premji v. Dossa*, 10 Bom. 358; *Mahadeva v. Ramakrishna*, 50 M.L.J. 67, A.I.R. 1926 Mad. 114. But this presumption can be rebutted, and if it can be shewn that the acknowledgment of liability by one of the partners was not an act necessary for or usually done in carrying on the business of the partnership, the case will fall under the general rule contained in sub-section (2)—*Dalsukhram v. Kalidas*, 26 Bom. 42

If the partnership had been dissolved at the date of the acknowledgment, and the creditor had had notice of such dissolution, the acknowledgment by one partner will be of no avail as against the firm—*Dalsukhram v. Kalidas*, 26 Bom. 42; *Ganda Singh v. Bhag Singh*, 7 Lah. 403, A.I.R. 1926 Lah. 616, 99 I.C. 563. In the absence of express evidence of authority, an acknowledgment of a partnership-debt by an ex-partner, after the dissolution of the partnership, is not binding on any other ex-partner. Where, however, an ex-partner is authorised to collect the outstandings and pay all debts of the partnership, such authority includes the lesser power of acknowledging debts—*Muthuswami v. Shankara Lingam*, 1915 M.W.N. 722, 30 I.C. 675, 2 L.W. 823.

According to English law also, so long as the partnership exists, each partner, in the absence of evidence to the contrary, is presumed to be the agent of the others to make payments on account of debts due by the firm, because payments by any one partner are payments by the firm; but as soon as the partnership is dissolved, such agency ceases unless specially reserved, and payments by one can then only be held to be payments by all on proof that such payments were actually authorised by all—*Watson v. Woodman*, L.R. 20 Eq. 721 (730); *Wood v. Braddick*, (1808) 1 Taunt. 104; *Pritchard v. Draper*, (1831) 1 Russ. & Myl. 191; *Goodwin v. Parton*, 41 L.T.N.S. 91; *Bistow v. Miller*, 11 Ir. L.R. 461; *Lightwood's Time Limit on Actions*, page 383. After the partnership has determined or has been discontinued, a partner cannot validly acknowledge a partnership debt—*Thomson v. Waithman*, (1856) 3 Drew. 628; *Kilgour v. Finlyson*, (1789) 1 H.B. 155; *Watson v. Woodman*, (supra). But where the partnership has been discontinued or determined upon the condition that A only shall go out of it, and that it shall continue as between B and C, and there are also special arrangements by which A is to ostensibly remain a partner, and is to be entitled also to resume (in a certain event) his old position of a partner, in such a case B and C or either of them may validly acknowledge a debt of the old partnership (by payment of interest or part-payment of the principal) so as to

keep that old debt alive as against A—*Tucker v. Tucker*, [1894] 3 Ch 429 : 63 L.J. Ch. 737.

If the partnership had been dissolved by the death of one of the partners, an acknowledgment made by the surviving partners, unless they are specially authorised to do so, cannot bind the representatives of the deceased partner—*Rajagopala v. Krishnaswami*, 8 M.L.J. 261.

208. Co-executors :—An acknowledgment by one executor only keeps alive the debt against the assets of the testator but is not sufficient by itself to make the other executors personally chargeable—*Dick v. Fraser*, [1897] 2 Ch. 181, *Fordham v. Wallis*, (1853) 17 Jur. 228; *Astbury v. Astbury*, [1898] 2 Ch. 111.

209. Co-mortgagees :—An acknowledgment of the title of the mortgagor made by one only of two mortgagees would not avail to save the mortgagor's right of redemption from being barred by limitation, where the mortgage was a joint mortgage and not capable of being redeemed piecemeal—*Dharma v. Balmakund*, 18 All. 458; *Bhogilal v. Amritlal*, 17 Bom. 173; *Richardson v. Younge*, L.R. 6 Ch. 478.

"Chargeable" :—The word 'chargeable' means every kind of chargeability and includes liability as to propriety, it is not limited to personal liability only—*Thayammal v. Muthukumaraswami*, 57 M.L.J. 588, A.I.R. 1929 Mad. 881 (884).

210. Co-contractors :—One of several co-contractors (co-debtors, co-mortgagors, etc.) cannot make an acknowledgment or payment on behalf of the others. In case of co-contractors, jointly and severally liable, an acknowledgment of liability or a payment by one of them does not deprive the other of the benefit of limitation, unless the payer is authorised to make the payment by the other as an agent on his behalf—*Oudh Commercial Bank v. Bishambhar*, 2 Luck. 180, A.I.R. 1926 Oudh 601, 96 I.C. 353. In England also, it has been laid down by the Mercantile Law Amendment Act, 1856, sec. 14, that where there are two or more co-contractors or co-debtors (whether bound jointly only or jointly and severally) no such co-contractors or co-debtors shall lose the benefit of the bar of time by reason only of any part-payment by any other or others of the co-contractors or co-debtors. And so one co-debtor cannot make payment or acknowledgment to bind the others—*Jackson v. Woolley*, (1860) 8 El. & Bl. 778.

Co-mortgagors :—Co-mortgagors stand in the position of joint contractors. A co-mortgagor cannot make payment or acknowledgment on behalf of another co-mortgagor, when there is nothing to warrant the inference that the former acted as an agent duly authorised by the latter in making the payment or acknowledgment—*Thayammal v. Muthukumaraswami*, 57 M.L.J. 588, A.I.R. 1929 Mad. 881 (884); *Narayana v. Venkataramana*, 25 Mad. 220, 233 (F.B.). But in some other cases it has been held that since every mortgagor is liable for the entire debt secured by the mortgage, payment by one of the mortgagors is effectual to extend the period against all the co-mortgagors—*Achola Sundarl v.*

Doman, A.I.R. 1926 Cal. 150, 90 I.C. 774; *Roshan v. Kanhaiya*, 41 All. 111; *Ibrahim v. Jagdish*, A.I.R. 1927 All. 209 (210); *Ghasi v. Thakur Kishori*, 27 A.L.J. 446, A.I.R. 1929 All. 380 (381)

Co-heirs —The word “joint contractors” in sub-sec (2) does not include the co-heirs of a deceased debtor, nor can this sub-section be extended by analogy to co-heirs—*Narasimha v. Ibrahim*, 56 M.L.J. 630, A.I.R. 1929 Mad. 419 (420), dissenting from *Arjun v. Rohina*, 14 I.C. 128 (Cal.).

Surety —The expression “joint-contractor” applies also to a surety—*Kothandaraman v. Shanmugam*, 32 I.C. 608 (Mad.). The principal debtor and the surety are often in the position of joint contractors, and under this section one joint contractor is not bound by an acknowledgment or payment made by another. A payment by the debtor does not keep alive the action against the surety, nor can a payment by the surety keep alive the debt against the principal debtor—*U. N. Mitra's Limitation*, 5th Edn., pp. 824, 825. In England, however, it has been held that a principal debtor and surety do not stand in the position of co-contractors or co-debtors, and so, the payment of interest or a part-payment of the principal by the principal debtor will keep alive the debt as against the surety—*Lindsell v. Phillips*, (1885) 30 Ch. D. 291. See Note 203 under sec 20.

22. (1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

Effect of substituting or adding new plaintiff or defendant.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

211. Scope of section :—Sub-section (1) does not apply to cases in which the plaintiff is added in the course of the suit in consequence of assignment of interest from the original plaintiff, but is confined to cases where the new plaintiff is added or substituted *in his own right*, so that he may himself be considered to be instituting a suit *independently* of the right of the original plaintiff—*Arunachella v. Orr*, 40 Mad. 722. If the plaintiff is added in consequence of assignment of right from the original plaintiff, the case will fall under sub-section (2) and not sub-section (1).

This section is confined to *suits* only, and does not apply to proceedings in execution—*Golab Koor v. Syed Mohammad*, 2 P.L.T. 619, 62 I.C. 30. See the definition of ‘suit’ in section 2 (10). The word ‘suit’ in this section includes only the stages of a suit down to its termination

by the decree of the trial Court, and does not include an appellate stage or proceedings in execution of the decree made in the suit. Therefore, an application to set aside an *ex parte* decree cannot, as regards the added party, be deemed to have been made when the added party was brought on the record—*Chandrika v. Ramkuer*, 6 P.L.J. 463, A.I.R. 1923 Pat. 88, 62 I.C. 530.

212. Addition of new plaintiff or defendant :—All plaintiffs who have a *joint* cause of action must be impleaded before the expiry of the period of limitation. If some of them institute a suit within time and the other plaintiffs are added after the period of limitation, the claim of the original plaintiffs also, who had a *joint* cause of action with the added plaintiffs, would be barred, as the claim could not be enforced without the additional plaintiffs—*Ramsebuk v. Ram Lal*, 6 Cal 815; *Girwar v. Makbunnessa*, 1 P.L.J. 468, 36 I.C. 542, *Dalla Ram v. Nibahumall*, 1886 P.R. 8; *Mir Tapurah v. Gopi Narayan*, 7 C.L.J. 251; *Motan Mall v. Kripa Mall*, 79 P.R. 1906, *Bhagela v. Abdul Rahaman*, 1 P.L.J. 472 (Note). Where one of three brothers sued alone for a joint debt, and when objection was taken to the form of the suit it was too late to bring in the other brothers as co-plaintiffs, the debt having by that time become time-barred, it was held that the suit must be dismissed—*Kalidas v. Nathu*, 7 Bom. 217, see also *Imamuddin v. Liladhur*, 14 All. 524; *Motan Mal v. Kripa Mal*, 79 P.R. 1906. But if no objection as to the non-joinder of parties is taken by the defendants, the suit will not be barred. Where the original plaintiffs alone sued within the period of limitation, and others who had a joint cause of action were added after the expiry of the period on their own application, no objection as to the non-joinder of parties being taken by the defendants at any stage of the proceedings, the suit would not be barred—*Shirekullu Timapa v. Ajjibal*, 15 Bom. 297; *Pateshri v. Rudra*, 26 All. 528.

Where the cause of action is *separate*, a suit wherein certain defendants were added at a time when a separate suit against them would be barred, is liable to be dismissed as against *them* only on the ground of limitation—*Obhoy v. Kritarthamoyi*, 7 Cal. 284. But where the relief sought is not separable, the suit will be dismissed as against all the defendants—*Habibullah v. Achaibar*, 4 All. 145.

The question whether the joinder of parties after the institution of a suit shall necessarily involve the bar of limitation, if the prescribed period has expired, must depend upon the consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed. If the fresh parties are joined merely for the purpose of safeguarding the right subsisting as between them and the others claiming generally in the same interest, the fact that the suit is barred as regards the freshly joined parties does not ordinarily affect the right of the original plaintiffs to continue the suit—*Guruvayya v. Dattatraya*, 28 Bom. 11 (17, 18); *Gehimal v. Karmumal*, 35 I.C. 551, 10 S.L.R. 38. When a party is brought on the record out of time, the question of limitation does not arise when there

Doman, A.I.R. 1926 Cal. 150, 90 I.C. 774; *Roshan v. Kanhaiya*, 41 All. 111; *Ibrahim v. Jagdish*, A.I.R. 1927 All. 209 (210); *Ghasi v. Thakur Kishori*, 27 A.L.J. 446, A.I.R. 1929 All. 380 (381).

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This section is confined to suits only, and does not apply to proceedings in execution—*Golab Koor v. Syed Mohammad*, 2 P.L.T. 619, 62 I.C. 30. See the definition of 'suit' in section 2 (10). The word 'suit' in this section includes only the stages of a suit down to its termination

by the decree of the trial Court, and does not include an appellate stage or proceedings in execution of the decree made in the suit. Therefore, an application to set aside an *ex parte* decree cannot, as regards the added party, be deemed to have been made when the added party was brought on the record—*Chandrika v Ramkuer*, 6 P.L.J. 403, A.I.R. 1923 Pat. 88, 62 I.C. 536.

212. Addition of new plaintiff or defendant :—All plaintiffs who have a joint cause of action must be impleaded before the expiry of the period of limitation. If some of them institute a suit within time and the other plaintiffs are added after the period of limitation, the claim of the original plaintiffs also, who had a joint cause of action with the added plaintiffs, would be barred, as the claim could not be enforced without the additional plaintiffs—*Ramsebak v. Ram Lal*, 6 Cal 815; *Girwar v. Akbunnessa*, 1 P.L.J. 468, 36 I.C. 542; *Dalla Ram v. Nibahumall*, 1886 P.R. 8; *Mir Tapurah v. Gopi Narayan*, 7 C.L.J. 251; *Motan Mall v. Kripa Mall*, 79 P.R. 1906; *Bhagela v. Abdul Rahaman*, 1 P.L.J. 472 (Note). Where one of three brothers sued alone for a joint debt, and when objection was taken to the form of the suit it was too late to bring in the other brothers as co-plaintiffs, the debt having by that time become time-barred, it was held that the suit must be dismissed—*Kalidas v. Nathu*, 7 Bom. 217; see also *Imamuddin v. Liladhur*, 14 All 524; *Motan Mal v. Kripa Mal*, 79 P.R. 1906. But if no objection as to the non-joinder of parties is taken by the defendants, the suit will not be barred. Where the original plaintiffs alone sued within the period of limitation, and others who had a joint cause of action were added after the expiry of the period on their own application, no objection as to the non-joinder of parties being taken by the defendants at any stage of the proceedings, the suit would not be barred—*Shirekullu Timapa v. Ajjibal*, 15 Bom 297; *Pateshri v. Rudra*, 26 All 528.

Where the cause of action is separate, a suit wherein certain defendants were added at a time when a separate suit against them would be barred, is liable to be dismissed as against them only on the ground of limitation—*Obhoy v. Kritarthamoyi*, 7 Cal 284. But where the relief sought is not separable, the suit will be dismissed as against all the defendants—*Habibullah v. Achaibar*, 4 All. 145.

The question whether the joinder of parties after the institution of a suit shall necessarily involve the bar of limitation, if the prescribed period has expired, must depend upon the consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed. If the fresh parties are joined merely for the purpose of safeguarding the right subsisting as between them and the others claiming generally in the same interest, the fact that the suit is barred as regards the freshly joined parties does not ordinarily affect the right of the original plaintiffs to continue the suit—*Guruvayya v. Dattatraya*, 28 Bom. 11 (17, 18); *Gehimal v. Karmumal*, 35 I.C. 551, 10 S.L.R. 38. When a party is brought on the record out of time, the question of limitation does not arise when there

is no relief claimed against that party—*Jadu Nath v. Amulya*, 46 C.L.J. 118, 104 I.C. 576, A.I.R. 1927 Cal. 794; *Mahomed Ishaq v. Sk. Akramul Huq*, 12 C.W.N. 84, 6 C.L.J. 558.

The test to be applied is—whether the suit was properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded. A suit is not said to be properly constituted unless all the necessary parties are impleaded in it. By necessary parties are meant those parties who ought to be joined and who are indispensable, as without them no decree at all can be made. If these parties are not joined, then the suit is bad for non-joinder, and the addition of these parties after the period of limitation will necessitate a dismissal of the suit. If however the necessary parties are impleaded, the non-joinder of other persons who are not necessary or indispensable but whose joinder is only desirable to safeguard their rights and the rights of others, and to prevent further litigation, does not render the suit as improperly constituted, and the joinder of those persons after limitation will not necessitate the dismissal of the suit—*Shaha Saheb v. Sadashiv*, 43 Bom. 575 (580, 581), *Coorla Spinning Mills v. Vallabhdas*, 27 Bom. L.R. 1168, A.I.R. 1925 Bom. 547, *Ram Chand v. Subhan Baksh*, 1902 P.R. 69, *Ramdoyal v. Junmenjoy*, 14 Cal. 791, *Imamuddin v. Liladhur*, 14 All. 524, *Ambika Charan v. Tarini Charan* 18 C.W.N. 464, 19 I.C. 963; *Sital Prasad v. Katjut*, 26 C.W.N. 488, A.I.R. 1922 Cal. 149; *Labhu Ram v. Kanshi Ram*, 57 P.R. 1905, *Pateshri v. Rudra Narain*, 26 All. 528, affirmed, 32 All. 241 (P.C.); *Hazari Mal v. Bhawan*, 30 All. 538; *Annamalai v. Murugappa*, 38 Mad. 837 (842); *Virchand v. Kondu*, 39 Bom. 729, 31 I.C. 180. Contra—*Mathewson v. Ram Kanai*, 36 Cal. 675 (688), and *Hasan Ali v. Gurudas*, 33 C.W.N. 248 (249), where it is stated that sec. 22 applies where the party subsequently added is a proper party, even though he is not a necessary party, and he cannot be added after the expiry of the period of limitation.

Where a suit for sale of mortgaged property was instituted against the mortgagor's minor son, and upon the allegation of the guardian that the mortgagor (a Muhammadan) left a widow and two daughters, the widow and the daughters were made defendants after the period of limitation, and it was contended by the added defendants that the suit was barred against them, it was held, overruling the contention, that the suit as originally framed was not improperly constituted, in the sense of being instituted against only one of several parties to a contract, nor was it instituted to enforce claims against shares in the hands of heirs; but it was one to enforce a mortgage lien against the property and the plaintiff could have obtained relief in the suit as originally filed in as much as the money was specifically charged upon the property—*Virchand v. Kondu*, 39 Bom. 729, 31 I.C. 180. A suit was brought against the original mortgagors, but on objection being taken that the sons ought to have been joined, the sons were added as defendants at a time when a suit against the sons would have been barred by limitation. Held that the sons were sufficiently represented in the suit by their respective fathers and the unnecessary addition of the sons after the period of limitation would not

justify a dismissal of the suit—*Hori Lal v. Munwan Kunwar*, 34 All. 549 (F.B.) 15 I.C. 126. See also *Rajwanta v. Rameshar*, 12 O.L.J. 235, A.I.R. 1925 Oudh 440. Where all the adult members of a joint Hindu family appear on the record as defendants, it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members, though it is not formally stated in the plaint that the defendants were being sued as managers, and therefore the addition of the minor members as defendants after the period of limitation does not justify a dismissal of the suit—*Chetan Singh v. Sartaj Singh*, 46 All. 709, 22 A.L.J. 702, 79 I.C. 1001, A.I.R. 1924 All. 908. Defendant executed a bond in favour of X and Y, who were members of a joint family, and upon partition the bond fell to the share of X, who alone then brought a suit on the bond; the defendant contended that Y should be impleaded, and Y was then made a co-plaintiff after the period of limitation. Held that as Y was not a necessary party (he having no interest in the bond), the fact that he was impleaded after the expiry of the period of limitation did not affect the maintainability of the suit—*Padam v. Data Ram*, 30 P.L.R. 124, 115 I.C. 74, A.I.R. 1929 Lah. 505 (506).

The auction-purchaser is a necessary party to a proceeding to set aside an auction-sale. Therefore if one of the auction-purchasers is made a party after the expiry of the period, the application to set aside the sale will be barred—*Ajuddin v. Khoda Bux*, 50 I.C. 5 (Cal.). In a suit for partition, it is an inflexible rule of law that all interested parties should be joined as plaintiffs or defendants. Where the plaintiff in a suit for partition did not implead some of the co-sharers, the omission was a fatal one which could not be remedied by adding the names of those persons after the period of limitation—*Mahomed Ahmad v. Ansar*, 23 O.C. 62, 56 I.C. 304. Where a suit was brought in time making the common manager as well as some of the proprietors parties, and the other co-proprietors were made parties after the period of limitation allowed by law, it was held that the suit against the common manager was rightly brought, and that as the suit against him was in time, it was immaterial whether several proprietors were brought on the record out of time, because the latter were not necessary parties—*Chowdhury Kirtibash v. Umesh*, 16 C.W.N. 96, 11 I.C. 397, 14 C.L.J. 61. The alienee from a claimant of attached property after an order has been made in his (claimant's) favour and before a suit under O XXI. r. 63 has been instituted, is not a necessary party to the suit, and his addition after the period of limitation will not necessitate the dismissal of the suit as barred. The case also falls under sub-section (2) of this section as it is a case of assignment of interest, and the suit even so far as the assignee is concerned must be deemed to have been instituted when it was originally brought against the claimant, and not when the assignee from the claimant was added as a defendant—*Krishnappa v. Abdul Kader*, 38 Mad. 535, 25 I.C. 11. In a suit for pre-emption, the transferee from the original vendee is not a necessary party and his addition after limitation does not affect the suit—*Karan Dial v. Ali Muhammad*, 31 P.R. 1913,

18 I.C. 70. A suit for pre-emption in respect of a sale was filed against the two joint vendees, but it appeared that one of them had died previously to the suit. An application to bring his legal representatives on the record was not made till after the period fixed for the institution of the suit had expired. *Held* that the suit being barred against the representatives of the deceased vendee was also barred against the surviving vendee—*Hussain v. Hakim*, 86 P.R. 1919, 52 I.C. 587. In a pre-emption suit, there were four vendees, viz. T, B, D and J, but the plaintiff at first joined in his plaint T, D and J, but did not join B (who was the father of T) and on objection being taken, he joined B long after the period of limitation. *Held* that the suit must be dismissed as a whole—*Jwala Das v. Gopal*, 26 P.L.R. 447, 88 I.C. 555, A.I.R. 1925 Lah. 343. A suit to redeem the mortgage was brought by some of the heirs of the mortgagor within the period of limitation, and subsequently the plaintiffs applied to make the remaining heirs party defendants to the suit, after the period of limitation had expired; *held*, that the other heirs were not necessary parties in the sense that the plaintiffs were to lose their rights to redeem by reason of omission to make those persons parties to the suit, but that they were necessary parties only for the record in order to satisfy the provisions of O. XXXIV, r. 1, and to prevent the mortgagee from being subjected to suits being filed against him in succession by various parties entitled to the equity of redemption. Section 22 did not therefore apply and the suit was not barred—*Shivabai v. Shidheswar*, 45 Bom. 1009, 23 Bom. L.R. 405, 61 I.C. 590.

The addition, after the expiry of the period of limitation of a minor member of a Mitakshara family as a plaintiff to a suit on the mortgage is not fatal to the suit—*Thakurmani v. Dai Rani*, 33 Cal. 1079. Where two executors are jointly appointed under a will, a suit brought by one executor is defective; and the addition of the other co-executor (who is a necessary party) after the period of limitation will bar the suit—*Sreerangathanni v. Vaithilinga*, 40 M.L.J. 532, 63 I.C. 104. Where two out of several trustees of a temple sued to enforce certain claims of a temple, and on an objection being taken by the defendants, all the other trustees were subsequently added as parties after the period of limitation, it was held that the addition of those representatives, though out of time, would not bar the suit—*Poonappa v. Venkateshshaiyar*, 1919 M.W.N. 435, 50 I.C. 353. When a person is adjudicated an insolvent, the whole of his property passes to the Official Assignee by virtue of the vesting order. Consequently, nothing is left vesting in the insolvent which would give him a cause of action. So, a suit by an insolvent in his own name, after his adjudication, cannot be maintained, and the substitution of the name of the Official Assignee later on is adding a new plaintiff within the meaning of this section—*Sayad Daud v. Mulna Mahomed*, 28 Bom. L.R. 554, 95 I.C. 538, A.I.R. 1926 Bom. 366. But where during the pendency of a suit one of the defendants is adjudicated an insolvent, and the Official Receiver is added as a party-defendant, *held* that the addition of the Official Receiver is not an addition of a new party but a continuation of the old proceedings—*Kallaperumal v. Ramachandra*, 53 M.L.J. 142,

A.I.R. 1927 Mad. 693, 102 I.C. 444. R as owner of certain land brought a suit for damages for loss of crops. The defendant objected that R was a *benamidar* for his uncle. Thereupon the uncle was added as a second plaintiff at a time when a large portion of the claim had been barred. It was held that the first plaintiff as *benamidar* had full right to bring the suit, because he fully represented in his own person all the rights of the second plaintiff for whom he acted as agent all along. The addition of the second plaintiff's name did not make any difference in the character of the suit and would not necessitate the dismissal of the suit—*Ravji v. Mahadeo*, 22 Bom 672.

A suit by a managing member of a joint family will not be liable to dismissal on account of the other members of the family being added as plaintiffs after the period of limitation, if the newly added members ratify the institution of the suit by the managing member alone—*Sadulla Khan v. Bhana Mal*, 58 P.R. 1882.

213. Action in tort:—In suits upon a contract, all persons having the same cause of action must sue jointly, and if one of them is added after the period of limitation the whole suit will be barred. But this rule will not apply to actions in tort in which several persons have been damaged by the same tortious act. Therefore, where a suit for compensation for illegal distraint was brought by one of two persons jointly entitled to the crops distrained, and the other person was added as a plaintiff after his claim was barred, it was held that the whole suit was not barred but the first plaintiff was entitled to compensation as far as he was injuriously affected by the illegal distraint—*Jagdeo v. Padarath*, 25 Cal. 285. Where the defendants were first made defendants as sons and legal representatives of the deceased tort-feasor, but were discharged and the estate of the deceased was made defendant, but there being no administrator to the estate of the deceased, the sons were again reinstated as defendants, held that the suit must be deemed to have been filed as on the date of the re-instatement—*Haveli Shah v. Shaikh Pinda Khan*, 31 C.W.N. 174 (P.C.), 96 I.C. 887, A.I.R. 1926 P.C. 88.

214. Application by party—Delay of Court:—If the application for addition of parties is made within the period of limitation, but the order of the Court allowing the addition of parties is passed after the period, the date of the application will be regarded as the date of addition of the new parties, and the applicants will not suffer by reason of the delay of the Court—*Ramkrishna v. Ramabai*, 17 Bom 29.

Where an application to add a party-defendant is made, and is granted whether by the trial Court or by the Appellate Court in reversal of the trial Court's order rejecting the application, the suit must be deemed to have been instituted against the added party on the date on which the application to add him as a party is made. Otherwise, though an application might be made in time, by the dilatoriness of the Court or by the manœuvres of the opposite party or by a mistaken decision of the Court which had to be put right on appeal or revision, the order to which the party applying was entitled might not be made until the suit had become

not introduce a new plaintiff within the meaning of this section—*Anukul Chandra v Chairman, Dacca District Board*, 32 C.W.N. 396 (399), A.I.R. 1928 Cal. 485, 113 I.C. 24. Where the defendants in a suit were at first described as a firm doing business; thereafter it was discovered that the defendants were a joint Hindu family doing business under that name, and accordingly the plaint was amended by substituting the names of members of the family for the firm's name, *held* that this was not a case of addition of new parties but only of substitution of parties, and that the amendment did not affect limitation—*Ram Prasad v. Srinivas*, 27 Bom L.R. 1122, A I R 1925 Bom 527, 90 I C 685. Where a suit was at first brought by one S as the "authorised manager of the Rajahs," and subsequently at a time when a new suit would have been barred by limitation the Rajahs themselves were substituted as plaintiffs, it was held that the suit being the same, the change of parties did not affect the question of limitation—*Subodini v. Cumar Ganoda Kant*, 14 Cal 400. In a suit against a Railway Company to recover damages for loss of goods, the defendant was described in the title as "The Agent, B. B. & C. I. Ry. Company," but the amount was claimed against the Railway Company, and not against the Agent. The Railway Company filed an objection that the plaintiff's suit could not lie as it was filed against the Agent. *Held* that there was only a misdescription in the title of the Railway Company, and that the plaintiff should be given leave to amend the title by omitting the word "Agent," even though the period of limitation had expired—*Sarasour Manufacturing Co v B. B. & C. I. Ry Co.*, 47 Bom 785, 25 Bom. L.R. 513, A I R 1923 Bom 452. Where the suit was brought against the defendant described as "Agent, E. I. Railway" and the Railway Company contested the suit considering itself to be the party sued, and no specific objection was taken that the proper party had not been sued, *held* that it was a case of misdescription which could be amended even after the period of limitation—*Gopiram v Agent, E. I. Railway*, 30 C.W.N. 209, A.I.R. 1926 Cal 612, 94 I.C. 762. But where in a suit against the Railway Company, the plaintiff described the defendant as Agent of the Railway Company, and subsequently on objection being taken by the defendant to the frame of the suit, the plaintiff sought to amend the plaint by bringing the Company on record, and he stated that he all along intended to sue the Company and that in substance he sued the Company, *held* that it was not a case of misdescription, and that the amendment had the effect of adding a new party to the suit, and as it was prayed for after the period of limitation, the suit was barred—*Agent, B. N. Ry Co v. Behari Lal*, 52 Cal. 733, 29 C.W.N. 614, 90 I.C. 426, A.I.R. 1925 Cal. 716 (distinguishing and dissenting from 47 Bom. 785). Where a suit was instituted against the "Agent, East Indian Railway Company" and a personal decree was sought against the Agent, and there was no suggestion in the plaint that it was sought to bind the Railway Company by any decree that the plaintiff might obtain against the Agent, *held* that the plaintiff was not entitled, after the period of limitation for the suit had expired, to amend the plaint by substituting the Railway Company for the Agent, as such amendment would have the

A.I.R. 1927 Mad. 693, 102 I.C. 444. R as owner of certain land brought a suit for damages for loss of crops. The defendant objected that R was a *benamidar* for his uncle. Thereupon the uncle was added as a second plaintiff at a time when a large portion of the claim had been barred. It was held that the first plaintiff as *benamidar* had full right to bring the suit, because he fully represented in his own person all the rights of the second plaintiff for whom he acted as agent all along. The addition of the second plaintiff's name did not make any difference in the character of the suit and would not necessitate the dismissal of the suit—*Ravi v. Mahadeo*, 22 Bom 672.

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time-barred—*South Indian Industrials Ltd. v. Narasimha*, 50 Mad. 372, A.I.R. 1927 Mad. 468, 100 I.C. 680

215. Amendment of plaint, correction of misdescription, etc. :—This section is not intended to apply to a case in which the ground on which the original defendant is sought to be made liable is merely shifted, without new persons being introduced as defendants—*Saminatha v. Muthayya*, 15 Mad 417. Thus, where a plaint is amended without any persons being newly included as defendants, this section does not apply, and the date of the original presentation of the plaint is the date of the suit—*Mohini Mohun v. Bungsi*, 17 Cal 580 (P.C.). For instance, a suit was brought for the recovery of amounts alleged to have been spent by the plaintiff (ex-shebait) in protecting the debutter estate, and the defendant (who had been appointed receiver of the debutter estate) as well as all other possible claimants to the office of shebait were made parties. The defendant was sued both in his capacity as receiver and in his personal capacity, but the Court directed an amendment in the plaint so as to raise directly the question as to which of the claimants was at present entitled to the office of the shebait and should represent the estate, and the defendant being found to be entitled to the office of shebait was impleaded as shebait; it was held that the amendment did not alter the nature of the suit and the defendant was not brought on the record as a 'new defendant' within the meaning of this section—*Peary v. Narendra*, 37 Cal. 229 (P.C.), affirming 32 Cal. 582. A suit was at first brought against an idol 'under the servarakarship of Basdeo Prasad.' But on objection being taken by the other party, the plaint was amended by describing the defendant as 'Basdeo Prasad, Sarvarakar of the idol.' This amendment was made after the period of limitation. Held that such an amendment would not have the effect of introducing a new party into the record, and no question of limitation would arise—*Bodhi Rai v. Basdeo Prasad*, 33 All. 735 (F.B.). In a suit by a Hindu reversioner to recover property after the widow's death, the plaintiff, in the original plaint, stated that he claimed title through his father, but subsequently amended his plaint by saying that he claimed title through his uncle. Held that it was not essential that the plaintiff should have named any intermediate reversioner through whom he claimed title, and as there was no substitution or addition of a new plaintiff, the amendment of the plaint after the period of limitation did not bring this section into operation—*Bisheshar v. Hira Lal*, 19 O.C. 221, 36 I.C. 941. Where the plaintiff in the original plaint did not say that he was suing on behalf of a Company, and on objection being taken by the defendant, he agreed that the decree should be in favour of the Company, and prayed that the plaint be amended so that the suit might proceed as being instituted on behalf of the Company, it was held that this was not a case of adding a new plaintiff, for the plaintiff was already on the record, but the amendment simply made clear the capacity in which the plaintiff instituted the suit—*Muthukrishna v. Rajam Aiyanger*, 30 M.L.J. 57, 33 I.C. 357; *Rajam v. Muthukrishna*, 16 M.L.T. 251, 25 I.C. 945. Where the plaintiff originally sued in his personal capacity, and

subsequently the plaint was amended so as to show that the plaintiff sued on behalf of himself and as shebait, the amendment did not amount to an addition or substitution of a new plaintiff—*Kuarmani v Wasif*, 19 C W.N. 1193, 29 I.C. 813. The plaintiff sued within the period of limitation in his personal capacity for a certain sum of money alleged to have been realised by the defendant from the plaintiff's tenants, but after the expiration of the period he prayed to be permitted to sue also as an administrator to the estate of the deceased proprietor. *Held* that there was no change in the 'person' and that the suit was not barred by limitation—*Naba Kumar v. Higheazany*, 51 Cal. 845, 79 I.C. 403, A I.R. 1925 Cal. 419.

If the amendment of the plaint as to the capacity in which the plaintiff was suing introduces a totally new case, this section will apply, and the plaintiff will be deemed to be instituting the suit when he seeks to make the amendment. Thus, the plaintiff brought a suit against the defendants in 1914, alleging that he was a partner with the defendants up to June 1910 and asking for an account. The defendants pleaded that the plaintiff was not a partner but a servant remunerated by a share of the profits and that the plaintiff retired in 1905. In the Court of appeal, the plaintiff-respondent for the first time prayed that he might be allowed to amend his plaint on the footing that he was not a partner but a servant as alleged by the defendants. It was held that having regard to the stage of the case in which the amendment was asked for, and the nature of the amendment, it could not be granted, on the ground that the amendment introduced a totally different, new and inconsistent case, and that if the plaintiff were to institute a fresh suit on the date the amendment was asked for on the basis that he was a servant, the new suit would be barred by limitation—*Kalidas v Draupadi* 22 C W N 104, 43 I.C. 393.

This section only applies to new plaintiffs and defendants made parties personally and does not apply where the same legal person remains the plaintiff or defendant but that person has been sued by a wrong name or through a wrong representative. Thus, where a suit was brought against a Municipal Committee in the name of its Secretary, whereas it ought to have been sued in the name of its President, and an application was made to substitute the name of the President at a time when a new suit would have been barred, *held* that this amendment did not amount to a substitution of a new defendant—*Munni Kasundhan v Crooke*, 2 All. 296. Where a suit was brought by the manager in the name of the firm, the plaintiff being described as "the firm of K S by its manager S S." and the names of the partners were afterwards substituted for the name of the firm, it was held that the case was one of misdescription and not of misjoinder, and did not fall under section 22—*Kasturchand v. Sagarmal*, 17 Bom. 413. Where a suit was instituted in the name of the Chairman District Board as plaintiff, but in the Appellate Court the plaint was amended by describing the plaintiff as "the District Board," *held* that the plaintiff being all along the District Board itself, the amendment was merely in respect of the description of the plaintiff, and did

not introduce a new plaintiff within the meaning of this section—*Anukul Chandra v. Chairman, Dacca District Board*, 32 C.W.N. 396 (399), A.I.R. 1928 Cal. 485, 113 I.C. 24. Where the defendants in a suit were at first described as a firm doing business; thereafter it was discovered that the defendants were a joint Hindu family doing business under that name, and accordingly the plaint was amended by substituting the names of members of the family for the firm's name, held that this was not a case of addition of new parties but only of substitution of parties, and that the amendment did not affect limitation—*Ram Prasad v. Srinivas*, 27 Bom. L.R. 1122, A.I.R. 1925 Bom 527, 90 I.C. 685. Where a suit was at first brought by one S as the "authorised manager of the Rajahs," and subsequently at a time when a new suit would have been barred by limitation the Rajahs themselves were substituted as plaintiffs, it was held that the suit being the same, the change of parties did not affect the question of limitation—*Subodini v. Cumar Ganoda Kant*, 14 Cal. 400. In a suit against a Railway Company to recover damages for loss of goods, the defendant was described in the title as "The Agent, B. B. & C. I. Ry. Company," but the amount was claimed against the Railway Company and not against the Agent. The Railway Company filed an objection that the plaintiff's suit could not lie as it was filed against the Agent. Held that there was only a misdescription in the title of the Railway Company, and that the plaintiff should be given leave to amend the title by omitting the word "Agent," even though the period of limitation had expired—*Saraspur Manufacturing Co. v. B. B. & C. I. Ry. Co.*, 47 Bom 785, 25 Bom. L.R. 513, A.I.R. 1923 Bom 452. Where the suit was brought against the defendant described as "Agent, E. I. Railway" and the Railway Company contested the suit considering itself to be the party sued, and no specific objection was taken that the proper party had not been sued, held that it was a case of misdescription which could be amended even after the period of limitation—*Gopiram v. Agent, E. I. Railway*, 30 C.W.N. 209, A.I.R. 1926 Cal. 612, 94 I.C. 762. But where in a suit against the Railway Company, the plaintiff described the defendant as Agent of the Railway Company, and subsequently on objection being taken by the defendant to the frame of the suit, the plaintiff sought to amend the plaint by bringing the Company on record, and he stated that he all along intended to sue the Company and that in substance he sued the Company, held that it was not a case of misdescription, and that the amendment had the effect of adding a new party to the suit, and as it was prayed for after the period of limitation, the suit was barred—*Agent, B. N. Ry. Co. v. Behari Lal*, 52 Cal 733, 29 C.W.N. 614, 90 I.C. 426, A.I.R. 1925 Cal. 716 (distinguishing and dissenting from 47 Bom. 785). Where a suit was instituted against the "Agent, East Indian Railway Company" and a personal decree was sought against the Agent, and there was no suggestion in the plaint that it was sought to bind the Railway Company by any decree that the plaintiff might obtain against the Agent, held that the plaintiff was not entitled, after the period of limitation for the suit had expired, to amend the plaint by substituting the Railway Company for the Agent, as such amendment would have the

effect of substituting a new defendant—*E. I. Ry. Co. v. Ram Lakkan*, 3 Pat. 230, 78 I.C. 312, A.I.R. 1925 Pat 37; *Sinehi Ram Behari Lal v. Agent E. I. Ry. Co.*, 2 P.L.T. 679. In a plaint filed against two companies, the defendant companies were described as "the I. G. S. N. & Ry Co, Ltd and the R. S Navigation Co. Ltd., by their joint Agent, A E. Rogers." Mr. Rogers filed a written statement that the suit was not maintainable against him. Mr. Rogers then retired from the services of the two companies and left the country. At the trial of the suit the plaint was amended by expunging the name of Mr. Rogers. Held that the suit was not at first properly framed, and that it must be taken to have been instituted against the two companies on the date when the plaint was allowed to be amended—*I. G. S. N. & Ry. Co v Lal Mohan Saha*, 43 Cal. 441, 22 C.L.J. 241, 31 I C 35

Where the suit was originally brought against a 'Company' and the plaint was amended by bringing the individual partners of the Company on the record, the section was held to have no application as there was virtually no addition of new defendants but merely the correction of misdescription—*Pragi v Maxwell*, 7 All. 284. In the plaint in a partnership suit two defendants were described as Joharmull Manmull, and the plaint was subsequently amended by substituting the words "Joharmull Khemka and Manmull Khemka," held that such an amendment would not amount to a substitution of new parties, but it was an amendment merely for the purpose of more clearly describing the parties who were already before the Court. Sec 22 would not apply to the case—*Scodoyal v. Joharmull*, 50 Cal 549, 75 I C 81. In a suit to recover a debt due to a Company which had gone into liquidation, the plaintiff was at first described in the plaint as "The Official Liquidator, Himalayan Bank Limited in Liquidation." Afterwards the plaint was amended and the plaintiff was described as "The Himalayan Bank Ltd in Liquidation, plaintiff." This amendment was made after the period of limitation had expired; it was held that the amendment did not introduce a new plaintiff into the suit so as to let in the operation of this section—*Muhammad v. Himalayan Bank*, 18 All 198, F B (overruling *Ghulam v. Himalayan Bank*, 17 All. 292). Similarly, where the defendant was wrongly described as *Mr. P. J. Forbes*, but after the period of limitation the mistake was corrected and *Miss P J Forbes* was substituted, it was held that the suit was not barred by limitation since the mistake was a clerical one, and the case was merely one of misdescription—*Jogendra v Forbes*, 32 I C. 872 (Cal). Where two sons were placed on the record as the heirs of their deceased father, and subsequently it transpired that the father did not die intestate, but left a will appointing one of such sons his executor, and the record was altered after the expiration of the period by placing that son as executor instead of as heir, it was held that the change in the record was not an addition of a new defendant—*Prosunno v Mahabharat*, 7 C W N 575. The widow of a deceased person was appointed administratrix until her eldest son should attain majority, and a suit was instituted by the widow, after the eldest son had attained majority, under a bona fide belief that she was competent

to sue as administratrix ; but on discovering her mistake she prayed that her three sons should be substituted as plaintiffs, and the substitution was made at a time when the suit if instituted would be barred by limitation , it was held that this was not an addition of new plaintiffs within the meaning of this section—*Nistarini v. Sarat Chandra*, 20 C.W.N. 49, 22 C.L.J. 279, 29 I.C. 680.

Where a suit was brought on behalf of a Devasthanam in the name of a trustee who was not entitled to represent the idol, the amendment of the plaint by placing the name of the right trustee on the record does not affect the suit. The principle is that when the *cestui que trust* (here the idol) is substantially on the record of a suit from the beginning, the rectification of the original improper representation cures all original technical defects with effect from the date of the institution of the suit, and the rectification cannot be treated as an addition of a new party under this section—*Subramania Aiyar v. Subba Naidu*, 25 M.L.J. 452, 21 I.C. 421.

216. Addition of parties by Court—A Court in joining parties under sec. 32 of the C. P. Code, 1882 [O. 1 r. 10 (2), C. P. Code, 1908] is bound by the provisions of sec. 22, Limitation Act, and cannot disregard any question of limitation in respect of the suit itself as affected by such joinder—*Imam Ali v. Baynath*, 33 Cal. 613 ; *Ram Kinkar v. Akhil Chandra*, 35 Cal. 519 F.B. (overruling *Fakera v. Azimunnisa*, 27 Cal. 540 and *Grish v. Dwarka*, 24 Cal. 640 and virtually overruling 12 Cal. 642 also) ; *Imamuddin v. Liladthur*, 14 All. 524.

217. Assignment and devolution—See sub-section (2). Where the added plaintiff or defendant derives his title from the original plaintiff or defendant by an assignment or devolution pending the suit, he will not be treated as a new plaintiff or defendant, and the case is merely one of continuation of the original suit without any change in the date of the institution—*Fatfeh Muhammad v. Said Almad*, 3 P.R. 1907 ; *Meyappa Chetty v. Subbramaniam*, (1916) 1 M.W.N. 455, 20 C.W.N. 833, 35 I.C. 323 (P.C.), *Suput Singh v. Imrit Tewari*, 5 Cal. 720 ; *Arunachella v. Orr*, 40 Mad. 722, *Ganpat v. Adarji*, 3 Bom. 312 (321).

The only sort of devolution of interest contemplated by section 22 of the Act of 1877 was devolution by death ; and therefore where in a suit instituted within time, the plaintiff assigned over his interest, and the assignees were substituted on the record in place of the original plaintiff after the period of limitation had expired, the suit was held to be barred, for the assignees were considered as new plaintiffs under the section—*Harak Chand v. Deonath*, 25 Cal. 409 ; *Abdul Rahman v. Amirali*, 34 Cal. 612 (F.B.). But now sub-section (2) not only contemplates cases in which devolution of interest takes place by death but it extends to all cases of devolution including cases of assignment.

218. Addition of parties in appeal :—Addition of parties in appeal is governed by O. XLI. r. 20 of the C. P. Code. When a Court takes action under this rule, no question of limitation can arise—*Gajraj v. Gouri*, 18 O.C. 90 ; *Nathi Lal v. Lala*, 9 A.L.J. 410, 14 I.C. 35.

This section applies only to plaintiffs and defendants, not to appellants.

and respondents, as there is no Act which makes the former terms include the latter. Therefore, where a party to a suit is not made a respondent to an appeal, and the Court orders him to be made a respondent under sec 559 C. P. Code, 1882 (O. 41, rule 20, C. P. Code, 1908), he cannot object that the time for appealing against him has passed and that no relief can be granted as against him—*Manickya v. Baroda Prosad*, 9 Cal. 355 ; *Sohna v. Khalak Singh*, 13 All. 78. Where the liability of two defendants was joint, and the plaintiff by an oversight appealed against the first defendant only, and the second defendant was made a respondent after the time allowed for appealing against him had expired, it was held that section 22 did not bar the appeal, even so far as it affected the second defendant. The appellate Court can add or substitute new appellants or respondents even after the expiry of the period of limitation—*Court of Wards v. Gaya Prosad*, 2 All. 107 In *Ranjit Singh v. Sheo Prosad*, 2 All. 487 the Judges, while holding that the appellate Court is competent to add a respondent to the appeal, have laid down that the appellate Court is not competent to pass a decree against such added respondent if the appeal with reference to the date of the addition of such respondent is barred under section 22 of the Limitation Act.

219. Transposition of party :—A party transferred from the side of *pro forma* defendant to that of the plaintiff is not a new party to whom the provisions of sec 22 (1) will apply, and the suit cannot be deemed to be filed on the date of such transposition. The original date of filing is the material date for the purpose of limitation—*Dwarkanath v. Monmohan*, 19 C W N 1269, 30 I C 34, *Nagendrabala v. Tarapada*, 35 Cal 1065, *Husainara v. Rahmannessa*, 38 Cal 342 ; 8 I C. 837 ; *Municipal Council v. Veeraperumal*, 28 M L J 147, 28 I C. 45, *Khadir Moideen v. Rama*, 17 Mad 12, *Moolchand v. Bhup Singh*, 3 Luck. 241, 105 I C. 473, A I R 1927 Oudh 484, *Jibanti v. Gokool*, 19 Cal 760 Sub-section (1) will not apply where a defendant who was made such by the plaintiff at the time of the institution of the suit is transferred in that suit as a co-plaintiff—*Ra kishore Lal v. Alam*, A.I.R. 1926 Pat. 28, 90 I C 82 But where defendant No. 1 executed a promissory note in favour of defendant No. 2, a benamidar for the plaintiff, and the suit by the plaintiff not being maintainable independently, the defendant No. 2 was transposed to the side of the plaintiff, and joined as a co-plaintiff, at a time when the suit was barred, held that the transposition amounted to brining a new suit, and as it was made after the period of limitation, the suit must fail See *Ram Das v. Chhota Lal*, 9 P.L.T 238, A I R 1928 Pat. 24, 104 I C 526

23. In the case of a continuing breach of contract

Continuing breaches
and wrongs.

and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

The object of this section is to prevent multiplicity of suits and to enable one action to be brought for all loss suffered during the whole period the breach continued. The person damaged is not obliged to bring successive suits for damages but can wait and bring an action once for all at the end of the term when there is no possibility of future performances—*Secy. of State v. Venkayya*, 40 Mad. 910 (920, 921).

220. Continuing breach :—A breach of a covenant for quiet possession is a continuing breach, and a suit on such breach of covenant would not be barred so long as the breach continues—*Raja Balu v. Krishnarav Ramchandra*, 2 Bom. 273 (293). A breach of a covenant to repair is a continuing breach, because the covenant is broken every day the premises are out of repair—*Spoor v. Green*, L.R. 9 Ex. 99 (111). A lessee allowing rooms to be used contrary to a covenant, when he might have prevented such user, commits a continuing breach of contract—*Doe de Ambler v. Woodbridge*, 9 B. & C. 376.

Where contrary to the terms of an agreement the defendant built his *otla* so as to cover up a gutter, it was held that the continuance of the *otla* was a continuing breach of contract—*Ladakchand v. Nathu*, 1892 P. J. 299. By a family arrangement A agreed with B to refund to N the price of certain property sold by A to N of which a share belonged to B and of which B was put into possession under the arrangement. A having died without having paid the money, N obtained a decree against B for possession of a part of such property. Five years after N's suit, a suit was brought by B's representatives against A's representatives for damages for breach of the agreement. Held that this suit was not barred by limitation, as the breach was a continuing one and had not ceased even then—*Imdad Ali v. Nijabat Ali*, 6 All. 457. When one of the parties to a contract renders the performance thereof impossible, there is a continuing breach of contract throughout the whole of the contract period, and the suit may be instituted within three years from the expiry of that period—*Garmukh v. Secretary of State*, 16 P.R. 1899. A suit for partition of a house was brought in 1905. The suit was compromised, the defendant agreeing to transfer his interest to the plaintiff for a consideration, and the suit was dismissed. The agreement was not carried out and a second suit was brought for partition. Held that the right to partition was a continuing right, and the breach of the agreement was a continuing wrong. The second suit was not therefore barred—*T. C. Mukherji v. Afzul Beg*, 37 All. 155, 27 I.C. 694.

This section refers to cases of *continuing* breach of contract, and not to cases of *successive* breaches of contract. Thus, where the purchasers of certain land agreed to pay the vendors certain fees annually in respect of such land and agreed that in default of payment the vendors should be entitled to the proprietary possession of a certain quantity of the said land, a suit by the vendors for possession of such quantity of such land upon default of payment of the fees by the purchasers must be brought within 12 years (Art. 143) from the date of the first default, and this section did not apply, because the obligation created by the agreement was

not of a *continuing* nature, but was of a recurring kind and could admit only of a series of successive breaches—*Bhorraj v. Gulshan*, 4 All. 493 (496).

221. Continuing wrong :—The construction and occupation of a *balakhana* by the defendants over the mosque of which they were *mutnallis*, for the purposes of private residence is a continuing wrong, so that a fresh period of limitation begins to run at every moment of the time during which the wrong continues—*Muhammad Ahmad v. Muhammad Faizal*, 31 P.R. 1917, 39 I.C. 116. Every fresh appropriation of the income of a property by one co-sharer to the exclusion of the other co-sharers is a continuing wrong giving rise to a fresh cause of action to those co-sharers for a suit for a declaration of their rights—*Harnam Singh v. Makhan Singh*, 21 P.L.R. 1918, 44 I.C. 31. An infringement of a trade mark is a continuing wrong, and a fresh cause of action arises *die in diem* so long as the infringement continues—*Abdul Salam v. Hamudullah*, 97 P.R. 1913, 15 I.C. 116. A trespass upon immoveable property is a continuing one, and the owner may sue the trespasser for compensation within three years of the termination of the trespass—*Narasimma v. Ragupathi*, 6 Mad 176. Acts of trespass committed by the defendant over the plaintiff's land when the defendant has not acquired an easement for passing through plaintiff's land, constitute a continuing wrong giving rise to a recurrent cause of action—*Sheo Prosad v. Manger*, 12 A.L.J. 1150, 25 I.C. 185. The interference with the right of irrigation of a person is a continuing wrong within the meaning of this section—*Kania v. Narain*, 177 P.W.R. 1918, 50 I.C. 299. An obstruction caused by defendant to the immemorial egress of the plaintiff's rain-water over defendant's land is a continuing wrong and the plaintiff's suit for removal of the obstruction is protected from limitation by the express provisions of this section—*Punja v. Bai Kuvar*, 6 Bom 20. Where the defendant has not acquired an easement to drain his water on the plaintiff's land or roof, the construction of a drain by the former on the latter's land or roof is a continuous wrong giving rise to a continuous cause of action—*Ramphul v. Misree*, 24 W.R. 97; *Nur Muhammad v. Gouri Shanker*, 2 Lah L.J. 463, 56 I.C. 1003. An obstruction to a watercourse is a continuous wrong as to which the cause of action is renewed from day to day so long as the obstruction continues—*Rairup v. Abdul*, 6 Cal. 394 (P.C.). The obstruction by the defendant of a channel through which water flowed from a natural stream into the plaintiff's land is a continuing wrong, even though the stream had not a continuous flow and was dry for the greater part of the year—*Mohanth Krishna Dayal v. Bhawani*, 3 P.L.J. 51 (59), 43 I.C. 235. Where the right of a superior riparian proprietor to have the drainage water from his lands permitted to flow off in the usual course, was obstructed by the defendants (lower riparian proprietors) by blocking up the stream, it was held that their act was actionable whether special damage had or had not occurred, and so long as the obstruction continued, there was a continuous cause of action from day to day—*Subramanija v. Ramchandra*, 1 Mad 335; *Kasiswar v. Annoda Prasad*, 22 C.W.N.

606, 41 I.C. 863 Infringement of a right of way is a continuous wrong giving rise to a cause of action from day to day—*Soojan v. Shamed*, 1 C.W.N. 96, *Nirode v. Bharat*, 2 I.C. 410; *Nazim v. Wazidulla*, 29 I.C. 385, 21 C.L.J. 640. The disturbance of a right of ferry is in the nature of a nuisance and a continuing wrong within the meaning of this section—*Nityahari v. Dunne*, 18 Cal. 652

Wrongful attachment before judgment, if the attachment continues for any length of time, will be a continuous tort, and a suit for damages for such act will be governed by this section—*Surajmal v. Maneckchand*, 6 Bom.L.R. 704. But the Allahabad High Court is of opinion that a wrongful attachment before judgment is not a continuing wrong, as the wrong is complete as soon as the property is seized. That the intention of the Legislature is not to make section 23 applicable to such a case is indicated by comparison with Arts. 19 and 42 under which limitation runs from the date of cessation of the wrong—*Ram Narain v. Umrao*, 29 All. 615 (618). The same view is taken by the Madras High Court in *Pannaji v. Senaji*, 53 Mad. 621, A.I.R. 1930 Mad. 635 (637), 126 I.C. 721. A wrongful attachment of property by a Magistrate under section 146, Cr. P. Code is a continuing wrong during the time that the attachment continues—*Brojendra v. Sarojini*, 20 C.W.N. 481, 22 C.L.J. 283, 31 I.C. 242 (dissenting from *Rajah of Venkatagiri v. Isakapalli*, 26 Mad. 410); *Panna Lal v. Panchu*, 49 Cal. 544. In Madras, however, it has been held that such an attachment is not a continuing wrong, as the attachment is not a wrong, and the period of limitation for a suit for declaration of title runs from the date of attachment—*Rajah of Venkatagiri v. Isakapalli*, 26 Mad. 410 (416). In a Nagpur case also it has been held that where it is not known whether it was the plaintiff or the defendant who was guilty of interference with possession which led to the proceeding under Ch. XII of the Cr. P. Code, all that one can say as to what led the Magistrate to take possession is that it is either his inability to decide who was in actual possession or his decision that no party was in possession, and that neither of these can be said to be a 'wrong' by the defendant; hence there was no continuing 'wrong' within the meaning of this section during the period of attachment—*Yeknath v. Bahia*, 20 N.L.R. 195, A.I.R. 1925 Nag. 236, 85 I.C. 631.

Where the mortgagee in possession who is bound by the terms of the mortgage-deed to pay the Government revenue due on the land neglects to do so, and the mortgaged land is sold, held that there is a breach of the covenant, and the breach is a continuing one. The reason is that by the terms of Order 34, rule 7 of the C. P. Code of 1908, the mortgagor on payment of the mortgage-debt is entitled to be put in possession of the mortgaged properties, and this obligation is a continuing obligation on the mortgagee which cannot cease so long as the right of redemption is not barred; therefore the mortgagee's failure to put the mortgagor in possession of the land after redemption, by reason of the land being sold, amounts to a continuing breach of covenant—*Siva Chidambara v. Kamatchi Ammal*, 33 Mad. 71. A calingula was constructed by the

Government for the purpose of reducing the flow of water into a tank through a channel. The necessary effect of the calingula would have been to cause the water diverted from the channel to flood the plaintiff's land. To obviate this, a small drainage channel was formed by Government to carry off the surplus water. Plaintiff contended that the drainage channel was not sufficient to carry off the water and that the water which flowed over the calingula stagnated on his lands and made them unfit for cultivation. He prayed for a mandatory injunction directing that the calingula be blocked up. The defendant pleaded limitation. *Held* that the injury was a continuing one and that the suit was not barred by limitation—*Sankaravadivelu v. Secretary of State*, 28 Mad 72.

222. Suit for restitution of conjugal rights—The refusal of a wife to return to her husband, and allow him the exercise of conjugal rights, constitutes a continuing wrong giving rise to constantly recurring causes of action—*Bai Sari v Sankla*, 16 Bom 714, *Hemchand v. Shiv*, 16 Bom. 715 (note); *Binda v. Kauntha*, 13 All 126.

Arts. 34 and 35 of Act XV of 1877 required a suit for the recovery of wife or for the restitution of conjugal rights to be instituted within two years from the date of demand, but as the personal law of Hindus and Muhammadans does not require an antecedent demand in such suits, Articles 34 and 35 could not apply to those suits. The limitation applicable to those suits was held to be Article 120 read with section 23, so that those suits were practically exempt from the bar of limitation—13 All. 126. Articles 34 and 35 have been omitted from the present Act, so that those suits are now totally saved from limitation. See notes after Article 35.

But a suit for dissolution of marriage or for a declaration that a divorce had taken place between the parties is essentially different in cause of action from a suit for restitution of conjugal rights. Section 23 has no application to the former kind of suits—*Md Hamidullah v Fakhr Jahan*, 65 I C. 452, A I R 1922 Oudh 109.

223. What are not continuing breaches and wrongs:—Where a lease granted for the reclamation of certain jungle lands provided that the lessee should hold the lands rent-free for six years, and that in the beginning of the 7th year he should cause the lands to be measured and a settlement of rent made in respect of reclaimed lands, failing which the landlord would be entitled to possession, *held* that the period of limitation for a suit by the lessor for ejectment on the ground of lessee's failure to comply with the above-mentioned provision ran (Art. 143) from the lessee's failure to cause the measurement, and there was no continuing breach of contract under this section, because when the tenant failed to cause the measurement at the time prescribed by the lease, the breach was complete—*Gooch Sheikh v Mathewson*, 11 C.W.N. 661 (663). Where the suit is for ejectment of the defendant from a specific field, the fact that that field has been recorded as part of a thoroughfare and *shamilatti-deh* does not bring the suit under sec. 23—*Achar Singh v. Badhawa*, 124 P R. 1912, 15 I C 285 (286).

Upon failure to pay the principal and interest secured by a bond on the day appointed for such payment, a breach of the contract to pay is at once committed, but the fact that no payment is subsequently made does not constitute a continuing breach—*Mansab Ali v. Gulab Chand*, 10 All. 85; *Bhagwant v. Daryao*, 11 All. 416. Where a mortgage-deed provided that interest should be paid annually and that on failure of the payment of any year's instalment the mortgagee should be entitled to take possession, the mortgagee's cause of action accrued on the first failure to pay interest, and there was no continuing breach of contract—*Achhar Mal v. Hukman*, 28 P.R. 1897. A clause in a *wajib-ul-arz* of a village ran as follows: "If a resident of this village shall leave his residence and go to and settle in another village, he shall not be entitled to a cultivation and possession." Held that though it should be treated as an agreement between the proprietors on the one hand and the tenants on the other that the abandonment by a tenant of his residence in the village and his settling elsewhere involved a forfeiture of the lease, still it was not an agreement capable of continuous breach within the meaning of this section, and the period of limitation (under Art. 143) would run from the time when the forfeiture was incurred or the condition was broken—*Dhian Singh v. Mehan Singh*, 180 P.R. 1883.

An illegal distress or attachment of the tenant's crops by the landlord is not a continuing wrong. The wrong is complete and the cause of action arises on the date when the unlawful distress is made—*Pamu Sanyasi v. Zemindar of Jayapur*, 25 Mad. 540; *Venkataramier v. Vaithilinga*, 38 Mad. 655. But where the landlord detained the tenant's moveables even after the attachment had been set aside, the detention was held to be a continuing wrong—*Yamuna Bai v. Solayya*, 24 Mad. 339. The Allahabad High Court lays down the general rule that wrongful distraint is always a continuing wrong which is renewed every day that the distraint lasts and limitation runs from the date on which the distraint comes to an end—*Jhabhu v. Batul*, 45 All. 208, A.I.R. 1923 All. 146, 73 I.C. 299.

An inamdar gave his permanent tenant notice to pay enhanced rent or quit the land on a certain date, and more than 12 years after the date mentioned in the notice, sued the tenant to recover the enhanced rent or to eject. It was held that the suit was barred and that this section had no application to the case—*Gopalrao v. Mahadevrao*, 21 Bom. 394 (396). No reason has been stated in the judgment, but it appears from the argument of counsel that the right to demand rent at the usual rate may be a recurring right giving rise to a continuous cause of action, but the claim to demand enhanced rent is not a recurring right.

A *ronak* or platform was erected by the defendant as an integral part of his building, and was in existence for about 50 years, but the land upon which the *ronak* stood belonged to the Municipality. It was held that the Municipality lost their right, under Article 146A of this Act, to that portion of the land upon which the *ronak* stood, and that section 23 had no application as there was no continuing wrong, the injury being complete.

on the erection of the *rowak*; and the mere fact that its effect continued could not extend the time of limitation.—*Asutosh Sadhukhan v. Corporation of Calcutta*, 28 C.L.J. 494, 49 I.C. 93. An encroachment on the highway is not a continuing wrong. As soon as the encroachment is made, the wrong is complete—*Municipal Commissioners v. Sarangapani*, 19 Mad. 154 (157). Plaintiffs and defendants were joint owners of a courtyard. The defendants erected certain *chappars* or thatched sheds in front of the plaintiffs' house. Plaintiffs brought a suit for perpetual injunction directing the defendants to remove the thatched sheds and to restore the court-yard to its former condition. Held that this section was inapplicable, in as much as the moment the *chappars* were erected the injury complained of and sought to be removed by the injunction was complete, and there was no continuing injury under this section—*Lal Singh v Hira Singh*, 3 Lah.L.J. 128, 60 I.C. 20. Where the defendant threw sulphuric acid on the face of the plaintiff, the period of limitation for a suit for damages for personal injury (Art 22) ran from the date on which the sulphuric acid was thrown on the plaintiff, and the continuance of its effects up to a later date resulting in loss of one eye did not make the wrong a continuing wrong within the meaning of this section—*Abdulla v. Abdulla*, 25 Bom L.R. 1333, A.I.R. 1924 Bom 290.

Declaratory suit:—The principle of this section has no application to a declaratory suit (e.g., a suit for a declaration that properties improperly alienated are the subject of a trust), and there is no recurring cause of action for a declaratory relief—*Moulvi Md Fahimul v Jagut Ballabh*, 2 Pat 391 (403), A.I.R. 1923 Pat 475, 74 I.C. 403. This section applies to a continuing *wrong* and not to a continuing *right*. A declaratory suit under sec. 42, Specific Relief Act can be brought when the plaintiff's title is denied by some person, and the denial itself gives a cause of action for a declaratory relief. To such a suit, sec. 23 of the Limitation Act cannot apply—*Krishnaji v. Annaji*, 54 Bom 4, 31 Bom L.R. 1240, A.I.R. 1930 Bom 61 (63), 124 I.C. 773. It has been observed by the Calcutta High Court that a suit for a declaratory relief, except in cases specifically provided for by the Limitation Act (e.g., Arts 118, 124) cannot be held to be barred so long as the right to the property in respect of which the declaration is sought for is a subsisting and continuing right—*Chukkan v. Lolit Mohan*, 20 Cal 906 (925). But this ruling has been dissented from in the Patna and Bombay cases cited above, as well as in *Rajah of Venkatagiri v. Isakapalli*, 26 Mad 410 (416).

24. In the case of a suit for compensation for an

Suit for compensation for act not actionable without special damage.

act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

Illustration.

A owns the surface of a field B owns the subsoil B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by A against B runs from the time of the subsidence.

224. Specific injury :—The principle of this section is this : Where the cause of action lies, not in a specific act or omission, but in the resulting damage, the statute runs from the time when the plaintiff sustains the loss—*Whitehouse v. Fellowes* (1861) 10 C.B.N.S 765 Where an act is rightful in itself, i.e., unless and until damage results from it to another, the right of action is not complete and the time therefore does not run until the damage—*Roberts v. Read*, 16 East 215. This section should not be construed to mean that if a suit for compensation for malfeasance or misfeasance arises out of some specific injury to the plaintiff's property, the case will be taken outside Article 36, and would fall under the residuary Article 120 The effect which this section causes in the operation of the statute of limitation is not to extend or to restrict any period of limitation, but to modify the date or time from which the cause of action arises. That is to say, if a suit is for compensation for any malfeasance or misfeasance independent of contract, and not otherwise provided for, the limitation will be 2 years under Art. 36, and time will run not from the date of the malfeasance or misfeasance but from the time when the injury results—*Jagannath v. Kalidas* 8 Pat 776, 10 P.L.T. 191, A.I.R. 1929 Pat. 245 (246).

But where the wrongful act of the defendant itself gives rise to a cause of action, irrespective of any specific injury, this section does not apply Thus, where the defendant threw sulphuric acid on the face of the plaintiff, which resulted in the loss of one of his eyes, the act of the defendant was itself sufficient to give rise to a cause of action for damages for personal injury (Art. 22) as such an act was clearly punishable under the I. P. Code Time would run from the date when the act of throwing sulphuric acid was committed, and not from the date when the specific injury (viz loss of eye) resulted—*Abdulla v. Abdulla*, 25 Bom.L.R. 1333, A.I.R. 1924 Bom 290.

When a municipality caused subsidence of the plaintiff's house by carrying on certain excavations in the subsoil and the plaintiff claimed damages, held that the right to sue accrued to the plaintiff not from the date of excavation or subsidence but from the happening of the damage caused by the subsidence which followed the excavations—*Dwarkanath v. Corporation of Calcutta*, 18 Cal. 91 (99). A second or further subsidence may give rise to a second cause of action. But as no suit lies without damage, if the second subsidence does not cause to the plaintiff fresh damage, such subsidence does not give him a fresh right to sue—*Duarka Nath*, supra.

Each separate specific injury constitutes a fresh cause of action, and a separate period of limitation will run for each. Thus, if the defendant

excavates in his own land and thereby causes a subsidence in the plaintiff's, the person injured ought to sue in one action for all the effects, both existing and prospective, of that subsidence. But if in consequence of the defendant not supporting the plaintiff's land, another subsidence occurs some years afterwards, in consequence of the same excavation, the plaintiff will be entitled to bring a second suit for the subsidence, and limitation will run from the date on which it occurred—*Mitchell v. Darley Main Colliery Co.*, 14 Q B D 125, on appeal, (1886) 11 App. Cas. 127.

The illustration to this section is based on *Backhouse v. Bonomi*, (1858) 9 H L C 503.

25. All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

Computation of time mentioned in instruments.

Illustrations

(a) A Hindu makes a promissory note bearing a Native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiration of four months after the date computed according to the Gregorian calendar

(b) A Hindu makes a bond, bearing a Native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiration of one year after date computed according to the Gregorian calendar

225. Native date—In a simple unregistered bond, the date for repayment of money was fixed as 30th Chait 1286 (11th April 1880). The parties computed the time according to the Bengali Calendar, an 30th Chait 1289 being a holiday, the suit to recover money on the bond was instituted on the 1st Baisakh 1290 (13th April 1883). The suit was held to be barred, time must be computed according to the English Calendar and the suit ought to have been instituted within 11th April 1883 (29th Chait 1289)—*Deb Narain v. Ishan*, 13 C L R 153. See also *Dwarka v. Raja Ram*, 13 A L J. 486, 29 I C 980. The plaintiff sued on a note bearing a native date, Ashad Vadya 13th, Shak 1799 (7th August 1877), and containing a stipulation for payment of the money to that effect—"In the month of Kartic, Shak 1799,—that is to say, in four months,—we shall pay in full the principal and interest." The plaintiff was filed on the 6th December 1880. It was held that the period of four months for repayment of the debt was to be calculated according to the Gregorian Calendar, that the mention of Kartic 1799 as the time for repayment did not affect the question and the period of four months expired on 7th December 1877 (although that date corresponded with Margashirsha Shudhi 3rd), and that therefore the suit was not barred—*Rango v. Babaji*, 6 Bom 83. Where a deed was to operate for 1 years, and the parties meant it to run for 16 Telegu years, held the

notwithstanding the intention of the parties, the years must be deemed to be Gregorian Calendar years. Section 25 is absolute and there is no saving of cases in which it appears on the face of the contract that lunar months were intended by the parties—*Venkatasubrahmanya v. Bhiravaswami*, 53 M.L.J. 447, 105 I.C. 241, A.I.R. 1927 Mad. 917. A mortgage bond was dated 8th Asar 1283 Fasli (14th June 1876) and the money was stipulated to be repaid in the "month of Jeyth 1289 Fasli, being a period of six years." The last day of Jeyth 1289 answered to the 1st June 1882; but it was held that the period of six years from the date of the bond ended on the 14th June 1882, the time being calculated according to the Gregorian Calendar, and therefore a suit instituted on 12th June 1894 was in time—*Latifunessa v. Dhan Kunwar*, 24 Cal. 382.

If a starting point is to be calculated as so many months or so many years from a particular date, that point must be calculated according to the Gregorian Calendar. But if the starting point is otherwise fixed by the stipulation itself, as for instance where the intention was that the interest should be payable at the expiry of six months according to the Hindi Calendar, (that is to say on a particular date and not at the expiry of six months) and that the cause of action should arise on default, this section is not applicable—*Roshan Lal v. Chowdhury Bashir Ahmed*, 22 A.L.J. 902, 82 I.C. 330, A.I.R. 1925 All. 138.

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

26. (1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years,

Acquisition of right to easements.

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

(2) Where the property over which a right is claimed under sub-section (1) belongs to Government, that sub-section shall be read as if for the words "twenty years" the words "sixty years" were substituted.

Explanation.—Nothing is an interruption within the meaning of this section unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made.

Illustration.

(a) A suit is brought in 1911 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff

proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption from 1st January 1890 to 1st January 1910. The plaintiff is entitled to judgment.

(b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had asked his leave to enjoy the right. The suit shall be dismissed.

This section may be compared with section 15, Easements Act.

226. Scope of section :—This section is concerned only with the *acquisition* of the easement, and does not purport to measure the *extent* of the right or to indicate the *remedy* by which a disturbance of the right is to be vindicated; for that recourse must be had to the English law—*Paul v. Robson*, 39 Cal. 59 (76), 12 I.C. 60.

227. Easement defined :—Section 4 of the Indian Easements Act (V of 1882) defines an easement as "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something or to prevent and continue to prevent something being done in or upon, or in respect of, certain other land not his own. . . . 'Land' includes also things permanently attached to the earth: 'beneficial enjoyment' includes also possible convenience, remote advantage, and even a mere amenity; and the expression 'to do something' includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage of any part of the soil of the servient heritage or any thing growing or subsisting thereon." This definition of 'Easement' however will prevail only in those provinces (viz. Madras, C. P., Coorg, Bombay and U. P.) to which the Easements Act applies. The other provinces will be guided by the definition given in sec. 2 of this Act.

On the other hand, the present section and the one following as well as the definition of easement in sec. 2 will not apply to those provinces to which the Easements Act extends. See sec. 29, sub-sec (4).

228. Profit a prendre :—In Ind'a, it has been held that the word 'easement' as defined in sec. 2 has a much more extensive meaning than the word bears in the English law and embraces what in English law is called a *profit a prendre*, that is to say, a right to enjoy a profit out of the land of another. A prescriptive right of fishery is therefore an easement and may be claimed by any one who can prove a 'use' of it, that is, who can prove that he has of right claimed and enjoyed it without interruption for a period of twenty years, although he does not allege and cannot prove that he is, or was, in possession and enjoyment or occupation of any dominant tenement—*Chundee v. Shib*, 5 Cal. 945; *Loknath v. Jahaniz*, 12 I.C. 305, 14 C.L.J. 572; *Hill & Co. v. Sheoraj*, 1 Pat. 674, 64 I.C. 346, A.I.R. 1923 Pat. 58.

229. Air and light :—The Indian law, unlike the English Prescription Act, places light and air on the same footing—*Delhi and London Bank v. Harn Lall*, 14 Cal. 839 (855). The only amount of light

for a dwelling house which can be claimed by prescription or by length of enjoyment without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house—*Ibid* (at p. 854), following *Bagram v. Khettranath*, 3 B.L.R.O.C. 45 (46); *Modhosooodun v. Bissonath*, 15 B.L.R. 361. The amount of light enjoyed during the period of prescription should not be taken into consideration in measuring the amount of light to which the dominant owner is entitled. He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitation or business according to the ordinary notions of mankind, having regard to the locality and surroundings—*Jolly v. Kine*, [1907] A.C. 1; *Colls v. Home and Colonial Stores*, [1904] A.C. 179; followed in *Paul v. Robson*, 42 Cal 46 (P.C.) Where there has been an interference with ancient lights, no action can be maintained unless the comfort and convenience of the dominant premises has been affected considering their nature and locality, and the amount of light still left—*Debendra v. Surendra*, 31 C.W.N. 419 (425), A.I.R. 1927 Cal. 345, 102 I.C. 370. An interference with the access of light and air to plaintiff's house, by building on adjoining land, is not actionable unless the obstruction is such as to cause what is technically called a nuisance to the house; in other words, it must be such as to render the house unfit for the ordinary purposes of habitation or business; there is no such thing as a right to the uninterrupted flow of south breeze; and the only amount of light for a house which can be claimed by prescription or by length of time without an actual grant is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house—*Delhi and London Bank v. Hem Lal*, 14 Cal 839.

229A. Peaceably—Whether the user has been peaceable or not is a pure question of fact—*Sitikantha v. Radha Gobinda*, 56 Cal 927, 33 C.W.N. 517 (518). Repeated obstructions or interruptions by or on behalf of the servient owner show that the enjoyment has not been peaceable—*Eaton v. Swansea Water Works Co*, 17 Q.B. 267.

230. "Openly enjoyed"—There is a difference between the mode of enjoyment of air and light on the one hand and of the other easements on the other hand. It is sufficient if the air and light have been enjoyed peaceably, but the other easements must have been enjoyed openly and peaceably. The reason of this difference is that every one can see what light and air his neighbour is enjoying by looking at the outside of his neighbour's house, but other easements such as right of way may be used clandestinely.

Where a party in the course of acquiring a right of way by user, himself blocks up the passage permanently, which renders the enjoyment of the easement impossible so long as the obstruction continues, there cannot be said to be an open enjoyment of the way within the meaning of this section—*Sham Churn v. Tarney*, 1 Cal. 422.

Under the English law, a right of way cannot be gained by prescription unless with the knowledge of the owner of the servient tenement.

"In order that such user may confer an easement it follows that the owner of the servient tenement must have *known* that such an easement was being enjoyed and also have been in a position to interfere with and obstruct its exercise, had he been so disposed"—*Gale on Easements; Dalton v Angus*, 6 App. Cas. 828. But this rule seems to be inapplicable to India, because nothing is said in the Indian Limitation Act as to the knowledge of the servient owner being necessary for the acquisition of the right. The words "peaceably and openly" have been introduced into the Indian Act for the purpose of preventing those rights being acquired by stealth or by a constantly contested user, but actual knowledge of the user on the part of the servient owner is not necessary—*Arzun v. Rakhal Chunder*, 10 Cal. 214 (218).

231. "As an easement" :—A right of ownership and a right of easement are incompatible. If a person claims a site as owner, he cannot claim a right of way or user of watercourse over the same as an easement—*Chunilal v. Mangal Das*, 16 Bom. 592. The words "as an easement" show that the acts relied upon as evidence of the existence of a right must be done by one person upon the land of *another*. The acts must not be done by him upon his own land or land in his possession. While unity of possession lasts, no question of easement can arise—*Anderson v. Juggodumba*, 6 C.L.R. 282 (284). A person as dominant owner cannot enjoy an easement against himself as servient owner—*Madhoosoodun v. Bissonath*, 15 B.L.R. 361. On this principle, an easement is extinguished when the ownership of the dominant and the servient tenement vests in the same person.

A right of easement cannot be acquired against the landlord by the tenant in other lands of his landlord; since the landlord cannot enjoy a right of easement as against himself, so his tenant would not be able to have such a right as against him—*Moni Chunder v. Baikantha*, 29 Cal. 363.

232. Enjoyment "as of right" :—The enjoyment described by the words "as of right" does not mean user without trespass, but it means user in the assertion of a right—*Alimooddeen v. Wuzer Ali*, 23 W.R. 52. The words "as of right" connote that the person claiming the right must have exercised it as if he had been the true owner *without permission or license* from any one—*Sunder v. Nag*, 4 P.R. 1917, 37 I.C. 788; *Futleh Ali v. Asghar Ali*, 17 W.R. 11; *Diwan v. Jagta*, 1 Lah. 206 (209), 56 I.C. 728. To become an easement, the enjoyment of a right must be often peaceable and as of right; therefore the ability of the servient owner to stop the enjoyment irrespective of the dominant owner's will is inconsistent with the idea of a real easement existing—*Sunder v. Nag*, *supra*. The expressions 'as of right' 'openly' etc., have now been judicially interpreted, and it is now settled that in order to establish a right of easement it is enough for the plaintiff to prove that he has been exercising the right without interruption, without express or implied permission of the owner of the dominant (? servient) tenement and with-

out secrecy or stealth—*Behari v. Asutosh*, 41 C.L.J. 379, A.I.R. 1925 Cal. 788, 87 I.C. 19.

The burden lies on the plaintiff to shew that he has been enjoying the easement as of right—*Baroda v. Sreenath*, 18 I.C. 211; *Sheikh Khoda v. Sheikh Tajuddin*, 8 C.W.N. 359. Whether an enjoyment is as of right or not is a pure question of fact; and enjoyment as of right cannot be inferred as a matter of course from a finding of long user only—*Siti Kanta v. Gobinda Chandra*, 56 Cal. 927, 33 C.W.N. 517 (519), A.I.R. 1929 Cal. 542. But the Madras High Court is of opinion that where long user is proved, the presumption is that the enjoyment is as of right until the contrary is proved—*Kunjammal v. Rathinam Pillai*, 45 Mad. 633 (637).

When the enjoyment of an easement is open and manifest, and when it is not had in such wise as to involve the admission of any obstructive right in the owner of the servient tenement, the enjoyment is "as of right." The phrase does not imply a right obtained by grant from the owner of the servient tenement—*Mathuradas v. Bai Amthi*, 7 Bom. 522.

In questions regarding user of way as of right, the Court should consider the character of the ground, the space for which the right is claimed, the relation between the parties and the circumstances under which the user took place. The mere fact of frequent or constant user of the defendants' *uthan* (courtyard) by the plaintiff, the parties being relations and neighbours, does not amount to proof of user as of right—*Meser v. Hafzuddi*, 13 C.L.J. 316, 9 I.C. 965. The nature and character of the servient land, the friendship or relation between the dominant and servient owners, and the circumstances under which the user had taken place, may induce the court to hold that the user was not as of right but permissive—*Sheikh Khoda Buksh v. Sheikh Tajuddin*, 8 C.W.N. 359. Where the pathway claimed by the plaintiff lay through the courtyard of the defendant's house close to their kitchen and not far from a tank used by the female members of the defendant's family, it was held that the inference might be drawn that the user was permissive and not as of right—*Baroda v. Sreenath*, 18 I.C. 211. Plaintiffs and defendants were co-sharers of a well. To gain access to this well from the road, it was necessary for the plaintiffs to go across certain fields belonging to the defendants. Plaintiffs had used this road without let or hindrance for a period of 20 years and this road was the only road they could use to gain access to the well. It was held that having regard to the habits of the people of this country, the enjoyment of the road as of right would be presumed—*Duan v. Jagta*, 1 Lah. 206 (209), 56 I.C. 728.

Where the plaintiffs had been enjoying the right to work a watermill on the land of the defendants for nearly 50 years and it was found that they had been paying Rupee one per annum in lieu of the privilege of working the mill, it was held that the fact of payment was fatal to the plaintiffs' case because they failed to establish their enjoyment "as of right"—*Sunder v. Nag*, 4 P.R. 1917, 37 I.C. 788. The defendant, who had been using the water of the plaintiff's tank for irrigation purposes for

more than forty years had paid a sum of money to the plaintiff for repair of the embankment of the tank about 50 years ago; it was held that since the defendant was interested in the repair of the *bundh* as he had the right of irrigation, the money paid by him about 50 years ago for repair of the *bundh* and the arrangement entered into at that time to use the water of the tank did not make the user permissive—*Ghasiram v. Asirbad*, 15 C.W.N. 259 (261), 9 I.C. 69. A *Kumki* right in South Canara is not an easement, because it is a right to do certain things over Government waste land by *permission* of Government—*Nagappa v. Subba*, 16 Mad. 304.

233. "Without interruption" :—The term *interruption* means an obstruction or prevention of the user of the easement by some person acting adversely to the persons who claim it. The expression is altogether inapplicable to any voluntary discontinuance of the user by the claimant himself—*Sham Churn v. Tarney Churn*, 1 Cal. 422. Mere protests or verbal denials of the right claimed, not followed by any act to prevent the user, will not constitute an interruption of the right or prevent its acquisition by prescription—*Angus v. Dalton*, 6 App. Cas. 740. In case of light and air, the interruption must be such an obstruction as amounts to a *nuisance*, that is, it must be such as to render the house unfit for the ordinary purposes of habitation or business—*Delhi and London Bank v. Hem Lall*, 14 Cal. 839; *Paul v. Robson*, 42 Cal. 46 (P.C.); *Colls v. Home and Colonial Stores*, [1904] A.C. 179. The word 'interruption' in this section does not apply to the final period of cessation of enjoyment which may have lasted till the institution of the suit, but only to a period of cessation of enjoyment followed by a further period of enjoyment—*Amir Haidar v. Fajja*, 73 P.R. 1905.

Actual and continuous user not necessary.—The statute only requires enjoyment and not *actual* or *continuous* user; it is sufficient if it is proved that the right has been substantially enjoyed for the requisite period whenever occasion required, although it may not be exercised every moment—*Ghasiram v. Asirbad*, 15 C.W.N. 259, 9 I.C. 69; *Koylash v. Sonatum*, 7 Cal. 132; *Budhu v. Mahat*, 30 Cal. 1077; *Gopal v. Bankim*, 26 C.W.N. 121. [Illustration (b) in Sec. 26 of Act XV of 1877, which spoke of actual user, has been omitted from the present section.] Mere non-user cannot deprive a man of his right to enjoy the easement unless there was an intentional *abandonment* by which the person can be said to have relinquished it—*Vinayak v. Martand*, 6 Bom. L.R. 287; *Gopal v. Bankim*, *supra*.

An enjoyment of a watercourse may be said to be continuous even though it is dry for the greater part of the year and flows only in the rainy season—*Mohanth Krishna Dayal v. Bhowani*, 3 P.L.J. 51 (59), 43 I.C. 235.

There may be an easement of right of passage along a certain channel over the defendant's land, although the right is exercised during the monsoon only—*Ramsoonder v. Woomakant*, 1 W.R. 218. A temporary cessation of a right of way during the rainy season cannot affect the

right of user—*Shaikh Mahomed v. Shaikh Sefatoolla*, 22 W.R. 340. The use of light may be said to be actually enjoyed if the owner of the building has had the amenity or advantage of using the access of light whenever he chooses to use it although there may not have been an actual continuous user, as in the case of a window with shutters capable of being opened but which were often kept closed—*Cooper v. Straker*, 40 Ch. D. 21. The cessation of the user of an easement of grazing cattle during a time when the claimant has no cattle to graze does not put an end to the easement—*Carr v. Foster*, 3 Q.B. 581; *Durga v. Bhonatu*, 106 P.R. 1883.

234. Within two years before suit.—Para 1 of sub-sec. (1) is clearly controlled by para 2, because the latter explains how the period of 20 years necessary under the first para is to be computed. A title to easement is not complete merely upon the effluxion of the statutory period of 20 years, and however long the period of actual enjoyment may be, no absolute and indefeasible right can be acquired until the right is brought in question in some suit, and until it is so brought, the right is inchoate only; and in order to establish it when brought into question, the enjoyment relied on must be an enjoyment for 20 years up to within 2 years of the institution of the suit—*Siti Kanta v. Radha Gobinda*, 56 Cal. 927, 33 C.W.N. 517 (518), A.I.R. 1929 Cal. 542, 119 I.C. 293. A claim for prescriptive right would be defeated if the period of user had terminated more than two years before the filing of the suit—*Maung Pwe v. Maung Chan*, 7 Rang. 487, A.I.R. 1929 Rang. 300 (301). The plaintiffs sued the defendant for a declaration of a right of way over a plot of land belonging to the defendant. It was alleged that in April 1892, the defendant dispossessed the plaintiffs from the dominant tenement; and that the plaintiffs sued the defendant for recovery of possession of it under section 9 of the Specific Relief Act, and having obtained a decree, got possession on the 19th June 1895. But they did not use the right of way. The defendant, on the 21st June 1895, obstructed the disputed way by erecting sheds. The present suit was instituted on the 25th November 1895. It was held that as there was no enjoyment of the right of way on the part of the plaintiffs within two years before the institution of the suit, the suit must fail—*Jahnavi v. Bindu Basuni*, 26 Cal. 593.

235. Easement against Government.—See sub-section (2); and compare section 15 of the Easements Act (V of 1882) which provides. "When the property over which a right is claimed under this section belongs to Government, this section shall be read as if for the words 'twenty years' the words 'sixty years' were substituted."

Sub-section (2) did not exist in the Limitation Act of 1877, and so it was held that nobody could acquire any right of easement against the Government by any length of time—*Secy. of State v. Mathurabhai*, 14 Bom. 213, *Gangaram v. Secy. of State*, 21 S.L.R. 195, A.I.R. 1927 Sind. 270 (272). In *Arzan v. Rukhal Chandra*, 10 Cal. 214 (219), in which the Government was a party, the Judges proceeded on the assumption that

20 years' enjoyment of easement would give a prescriptive right against Government. But it should be noted that in this case Government was merely a lessee and could not claim a better position than its lessor who was a mere subject of the Crown

However, sub-section (2) of the present Act contains an express provision for the acquisition of easement against the Crown by 60 years' enjoyment.

236. 'Explanation'—Obstruction:—The plaintiff continued to use a water-course for a period of 19 years, 6 months and 19 days, when his enjoyment was interfered with by the defendant. Before one year from the date of interference had expired, the plaintiff instituted the present suit for an injunction restraining the defendant's interference. It was held that as the suit was brought after the expiration of 20 years from the date of the commencement of the enjoyment and within one year from the date of obstruction, and as the statutory period had expired within two years next before the institution of the suit, the plaintiff had established his right to easement. It was further held that as the obstruction in this case lasted for less than a year, the obstruction should be ignored for the purpose of calculating the period of 20 years, with the result that an easement could be acquired after an enjoyment of 19 years and a fraction, and that the requisite period of 20 years is curtailed by the Explanation to this section—*Sawan v. Chatter*, 48 P.R. 1918, 46 I.C. 17.

237. Acquiescence:—Acquiescence in the sense of mere submission to the interruption of the enjoyment does not destroy or impair an easement. To be effectual for that purpose, it must be attributable to an intention on the part of the owner to abandon the benefit before-enjoyed—*Ponnusami v. Collector of Madura*, 5 M.H.C.R. 6.

238. Other easements:—The right of the owner of a high land to drain off its surplus surface-water through the adjacent lower grounds is incident to the ownership of land in this country—*Abdul v. Gonesh*, 12 Cal. 323. Where the defendants had erected a dam across a natural water-course which was found to interfere with the natural drainage or the surplus rain-water of the adjacent lands of the plaintiff, it was held that the plaintiff was entitled to have only so much of the dam removed as interfered with his right—*Ibid.* A certain 'al' formed the boundary of two pieces of land belonging to the plaintiff and the defendant respectively. The plaintiff's land was on a higher level than that of the defendant, and from time immemorial the surplus water used to flow from the plaintiff's land through certain passages in the 'al' and across the defendant's land. It was held that the defendant could not do anything which would interfere with the egress of the water—*Imam v. Pareesh*, 8 Cal. 468. A plaintiff who seeks to enforce the right to discharge surplus water or to establish the existence of an easement in respect thereof is required to prove the acquisition of the easement under this section—*Maung Tha v. Ko Shwe*, 10 Bur. L.T. 38, 35 I.C. 394. Where the surplus water of the plaintiff's tank used to be discharged over the land of the defendant, openly and uninterruptedly year by year, for more

than twenty years, the plaintiff will be presumed to have acquired an easement—*Poorno Chunder v. Shurut*, 24 W.R. 228. Where a right to discharge dirty water is claimed as an easement, the onus is on the dominant owner to prove all the points which are necessary to establish his right under this section to discharge dirty water from his house on the servient owner's house—*Biya Ram v. Brij Lal*, 26 P.L.R. 42, 84 I.C. 676, A.I.R. 1925 Lah 297. A right to the uninterrupted flow of water along a defined channel over the lands of others may exist independently of the provisions of sec. 26, and when such a right is claimed as a customary and hereditary right and evidence is given in support of long user, such evidence may be sufficient to justify the Court in presuming a grant of the easement, and a Court is not justified in dismissing the suit on the ground that there had been no user by the plaintiff within two years prior to suit—*Srinivasa v. Secretary of State*, 5 Mad. 226. An easement of the supply of water from a natural stream may be acquired by 20 years' user under this section—*Abdul Rahman v. Muhammad Alam*, 57 P.R. 1918, 104 P.L.R. 1918, 46 I.C. 441.

Right to discharge rain water :—A right to discharge rain water flowing from the roof of the plaintiff's house upon the roof of the defendant's house can be acquired by prescription—*Mohan Lal v. Amrallal*, 3 Bom 174. Where rain water from the plaintiff's buildings used to flow on to the defendant's land from time immemorial, the plaintiff had, by long user, acquired a prescriptive right independently of the Limitation Act—*Punja v. Bai Kuvar*, 6 Bom 20.

Pasturage —A tenant may have a right of pasturage on his landlord's waste lands by immemorial user—*Bholanath v. Midnapur Zemindary Co.*, 31 Cal 503 (P.C.).

Fishery —A right of fishing in another's waters falls within the description of an easement under this section—*Lokenath v. Jahania Bibi*, 14 C.L.J. 572, 12 I.C. 305 (306). A right of fishery can only be claimed when the same person or persons are shown to have exercised it for a particular length of time. Where the defendants alleged that they in common with all the inhabitants of a zamindari had all along exercised a right of fishing in certain dhils, it was held that their act amounted to mere trespass, and not to dispossession of the plaintiff, and that no prescriptive right of fishery could be acquired by an *unascertained* mass of persons, such as the inhabitants of a zamindari—*Latchmeeput v. Sadula*, 9 Cal. 698. A right in the nature of a *profit a prendre* cannot be claimed by prescription by a large and indefinite class of persons, such as "owners and occupiers"—*Tilbury v. Sil'a* 45 Ch. D. 98.

A distinction should be drawn between an exclusive right of fishery involving an ouster of the real owner and a mere right to fish not excluding the rightful owner. An exclusive right of fishery is an interest in immoveable property (see notes under Article 144) and may be acquired by 12 years' adverse possession by operation of Art. 144 read with section 28. But a mere right to fish not excluding the real owner is a *profit a prendre* and falls within the definition of an easement under

sec. 2 (5) and may be acquired only by 20 years' possession under section 26—*Hill & Co v Sheoraj*, 1 Pat 674, 3 P.L.T. 53, 64 I.C. 346. In order to establish an exclusive right of fishery in a tidal navigable river it is necessary to prove that the plaintiff's user was in assertion of a right other and higher than the general right of the public to fish—*Abhoy Charan v. Dwarka*, 39 Cal. 53. It is doubtful whether an exclusive right of fishery in a tidal and navigable river can be acquired by proof of mere enjoyment in the manner provided by section 26; such right can only be acquired by a grant from the Crown—*Ibid.*; *Prosunno v. Ram Coomar*, 4 Cal. 53.

Ferry.—The right to maintain a ferry over the property of another is a right of easement which can only be acquired by user for 20 years—*Pardip Singh v. Secretary of State*, 5 P.L.J. 500, 57 I.C. 516; *Lachmeshwar Singh v. Manowar Hossain*, 19 Cal. 253 (P.C.); *Parmeshari v. Mahomed*, 6 Cal. 608.

Cornice.—Where the roof of one person overhangs the land of another for more than thirty years, such enjoyment will vest in the former a proprietary right in the space covered by the overhanging roof—*Mohan Lal v. Amratlal*, 3 Bom. 174.

239. Acquiring easement in other ways.—The mode of acquiring an easement provided by this section is not the only way in which an easement may be acquired, and where an easement is acquired otherwise than by 20 years' user, as for instance, by grant, express or implied, the rule as to obstruction for more than two years does not apply—*Rajrup v. Abdul*, 6 Cal 394 (P.C.); *Sheikh Abdul Ghani v. Harnam Singh*, 7 P.L.T. 260, A.I.R. 1925 Pat. 748, 90 I.C. 356; *Charu v. Dokouri*, 8 Cal. 956, *Punja v. Bai Kuvar*, 6 Bom 20. A person claiming a right of way based on custom need not rely on section 26 of this Act. Such a right may be established by proof of custom—*Ali Mahomed v. Sheikh Kalu*, 70 I.C. 263, A.I.R. 1923 Cal. 200. Section 26 is not exhaustive and does not exclude or interfere with other modes of acquiring easements, and therefore it is open to the plaintiff to show, if he can, that he is entitled to a right which may be of the nature of an easement, although not actually within the strict meaning of the term. Thus, in Bengal, where the mode of dedication of tanks to the public for bathing and drinking purposes is well known, when one finds that a tank exists for a long time past, and the public, that is, the people of its neighbourhood, have enjoyed the use of the water of such a tank, it is open to the Court to presume that the water of such a tank was dedicated by the owner for public use. Such a dedication can be inferred from the manner and the duration of such use. It is not necessary therefore to seek the aid of sec. 26 for the acquisition of a right to the use of the water—*Bhabadev v. Bhusan Chandra*, 53 Cal. 1010, 91 I.C. 712, A.I.R. 1926 Cal. 507.

240. Issues in easement suit.—In a suit to establish an easement, when limitation is pleaded, the proper issues to be framed under this section are—

(i) whether the easement in question was enjoyed peaceably, openly and as of right, by the plaintiff or those through whom he claims, within two years of the institution of the suit, and

(ii) in the event of the above issue being found in the negative, whether there is evidence of enjoyment on the part of the plaintiff or those through whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right, independent of the provisions of this section—*Achul v. Rajun*, 6 Cal. 812.

27. Where any land or water upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceed-

Exclusion in favour
of reversioner of ser-
vient tenement.

ing three years 'from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the period of twenty years in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled on such determination to the said land or water.

Illustration

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a Hindu widow, had a life interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

241. This section is similar to section 8 of the English Prescription Act, and is almost word for word the same as section 16 of the Indian Easements Act. It may also be compared with sec 7 of the English Prescription Act which lays down that the time during which an infant, an insane person or a married woman is the owner of the servient tenement is excluded from the period during which a prescriptive right is in course of acquisition

28. At the determination of the period hereby limited to any person for institut-
Extinguishment of right to property. ing a suit for possession of any property, his right to such property shall be extinguished.

Compare sec 34 of the Real Property Limitation Act, 1833 (3 & 4 Wm. IV, c. 27).

242. Application of section :—In cases where a special period of limitation is prescribed by a special or local law, it has been held that although this section may not apply to suits under special or local laws, yet the general principle embodied in this section may be applied to such suits. Thus the Calcutta High Court applied the principle of this section to a case under Schedule III, Art. 3 of the Bengal Tenancy Act—*Nanda Kumar v. Ajodhya*, 16 C.W.N. 351, 11 I.C. 465. See also *Dalip v. Deoki*, 21 All 204 (suit under N. W. P. Rent Act).

Where no period of limitation is prescribed, this section does not apply. Thus, the Madras Regulation VI of 1831 does not prescribe any period of limitation for a suit under that Regulation, nor does the first Schedule to this Act prescribe any limit for suits under that Regulation. Consequently such suits are not barred by any lapse of time, and there can be no extinction of title by operation of this section, nor an acquisition of title by prescription—*Pichuvayyan v. Velakkundayan*, 21 Mad 134.

This section does not apply unless there is some one in adverse possession of the property. Until some one is in adverse possession the owner of the property does not lose his right to the property merely because he happens not to be in possession of it for 12 years. Under this section his right is extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of property, that period cannot be determined unless it has commenced to run, and the period will not commence to run until the owner is aware that some one else in possession is holding adversely to himself—*Swamirao v. Bhimabhai*, 45 Bom. 1020 (1023); *Sukhdeo v. Ram Dulari*, 29 O.C. 131, 92 I.C. 825, A.I.R. 1926 Oudh 313, *Mubinulnissa v. Ali Husain*, 6 O.W.N. 652, 119 I.C. 866, A.I.R. 1929 Oudh 402 (405).

This section applies only to *suits* and not to applications, it does not say that at the termination of the period of limitation for an application, any right shall be extinguished—*Bhaiga Parida v. Gannath*, 3 P.L.J. 478 (481), 46 I.C. 569. Section 28 does not apply to an application under sec. 95 (n) of the N. W. P. Rent Act 1881 for the recovery of the occupancy of land of which the tenant has been dispossessed—*Dalip Rai v. Deoki Rai*, 21 All 204 (206).

This section only applies to persons *out of possession*; to persons who are *in possession* and have no occasion to sue for it, this section can have no application and does not prevent them from making use of any legal defence open to them in order to maintain their possession. Thus, the plaintiffs induced the defendant by fraud and misrepresentation to execute in their favour a deed of sale of the property in dispute. They did not pay the purchase-money, nor obtained possession of the property. Within twelve years from this transaction the plaintiffs sued for possession of the property on the sale-deed; the defendant impeached the deed as fraudulent. The plaintiffs contended that as the defendant had not sued to set aside the deed on the ground of fraud, within 3 years

under Article 91 or 95, or within 12 years from the date of sale, his plea of fraud was barred by limitation. *Held* that the plea of the defendant is not barred; this section applies only to a *plaintiff* instituting a suit for possession and does not apply to a *defendant* who relies on actual possession which has never been disturbed. The plaintiffs in this suit cannot seek to get a wider meaning put on section 28 so as to get it treated as a law of limitation applicable to the *defendant*; and the law of limitation cannot therefore be taken to have barred the right of the defendant to make use of any legal defence open to him (e.g. to impeach the sale on the ground of fraud)—*Hargavandas v. Bajibhai*, 14 Bom. 222; *Orr v. Sundra*, 17 Mad. 255; *Krishnacharya v. Lingawa*, 20 Bom 270, *Gokulchand v. Niadarmal*, 1 P R 1916 32 I C 485. See also Note 7 at page 6 *ante* under heading "Suits"

243. Suit for possession of property:—This section is confined to suits for *possession* and does not apply to a suit by a mortgagee for recovery of the money due to him by sale of the mortgaged property. The mortgagee's remedy may be barred if he omits to sue within the statutory period, but his right is not extinguished—*Jokhu v. Sitta*, 28 A L J 750, A I R. 1930 All 416 (417), 122 I C. 411. This section contemplates that the person whose right is extinguished by lapse of time is a person *entitled to institute a suit for possession* of the property. Thus, if after the grant of a simple mortgage the mortgagor is dispossessed, he is the person entitled to recover possession against the trespasser, and if he does not sue within twelve years, his right (*i.e.* the equity of redemption) is extinguished. But it does not affect the title of the simple mortgagee, as he is *not entitled to institute a suit for possession*; consequently the dispossession of the mortgagor does not extinguish the title of the mortgagee by lapse of time. His right to bring the property to sale remains unaffected—*Priya Sakhi v. Manbodh*, 44 Cal. 425 (438, 439). Where the property of which there has been adverse possession is subject to a mortgage, the adverse possession does not affect that mortgage, if such possession has been (and usually it will be) consistent with the continuance of the mortgage—*Banning*, 3rd Ed., p. 85. Similarly the fact that a Hindu widow's right to recover property has become barred does not make this section applicable so as to extinguish the right of the reversioners, because they are not entitled to institute a suit for possession during the lifetime of the widow. See Note 589 under Art 141.

Section 28 of the Limitation Act is limited to cases in which the bar of limitation applies to suits for *possession of property*. Therefore, where a property was attached by the Magistrate under section 146 Cr. P. Code, such attachment did not amount to dispossession, and a suit brought by the real owner for declaration of right to the lands was not a suit for *possession of property*. And although the declaratory suit, if brought more than six years, was barred under Art 120, such bar only affected the remedy or the relief by way of declaration, but *did not extinguish the right and title* of the true owner to the property, however long the attachment continued, and the attachment did not

work a forfeiture in favour of Government—*Rajah of Venkatagiri v. Isakapalli*, 26 Mad. 410 (417). This section is inapplicable where the plaintiff could only have sued to set aside certain instruments or for a declaration that they were not binding on him, and not for possession, the possession remaining with the plaintiff—*Chintaman v. Bhagvan*, 30 Bom. L.R. 1095, A.I.R. 1928 Bom. 383 (384). Similarly, the act of the Government in possessing the land of the plaintiffs and maintaining a ferry over it, when there is no intention to oust the plaintiffs from the ownership of the land, is merely an act in the exercise of a right of easement and does not constitute adverse possession so as to bring into operation the rule of 12 years' limitation; consequently the plaintiffs are not required to bring a suit for possession within 12 years, on pain of losing their property under this section; they can bring a suit for injunction against the Government within 20 years (i.e. before the Government acquires an easement)—*Pardip Singh v. Secretary of State*, 5 P.L.J. 500, 1 P. L. T. 395, 57 I.C. 516.

This section applies to all property for the possession of which a suit can be instituted, whether the property be moveable or immoveable—*Kanharamkutti v. Uthotti*, 13 Mad. 491. But it does not apply to suits for property which cannot be recovered in specie, e.g. debts, whether ordinary or judgment debts—*Ganda Mal v. Nanak Chand*, 3 P.R. 1887. A suit for recovery of a debt is not a suit for possession of property; therefore limitation only bars the remedy, but does not extinguish the right to the debt—*Nursing v. Hurryhur*, 5 Cal. 897, *Mohesh Lal v. Busunt Kumaree*, 6 Cal. 340 (348) (overruling *Nocoor v. Kally*, 1 Cal. 328; *Krishna v. Okhulmoni*, 3 Cal. 333, and *Ram v. Jagatmonomohini*, 4 Cal. 283); *Administrator General v. Hawkins*, 1 Mad. 267; *Ganda Mal v. Nanak Chand*, 1887 P.R. 3. Therefore though an attorney's action for costs under Art. 84 may be barred by limitation, his right to get the costs is not extinguished; so that if he has any form of lien upon any property in respect of his bill of costs, he can enforce that lien, notwithstanding that he cannot bring a suit to recover the costs—*Narendra Lal v. Tarubala*, 48 Cal. 817, 25 C.W.N. 800. Though a vendor's suit to recover purchase-money may be barred, still if he retains possession, he can claim payment before giving up possession—*Subramania v. Poovan*, 27 Mad. 28. Although a mortgagee may be barred after 12 years under Article 135 from suing for possession of the mortgaged property, that does not prevent him from suing for foreclosure, and from getting possession under the foreclosure decree. In the first case his right to possession is as mortgagee; after foreclosure he takes possession as owner—*Rallia Ram v. Sundar*, 83 P.R. 1883.

Where the plaintiff as the agent of the defendant (landlord) let out the land to a tenant who was in possession, and the plaintiff for more than 12 years appropriated to himself the rents collected and asserted a title in himself, and then brought a suit for possession on the ground of acquisition of title by adverse possession, held that so long as the tenant held possession under the tenancy he was the tenant of the defendant (landlord) and so long as actual possession was with the tenant,

the possession must be taken to be legally with the defendant who could not (and need not) have brought a suit for possession; the defendant's title was not therefore extinguished under this section—*Krishnadixit v. Baldixit*, 38 Bom. 53, 21 I.C. 763. This section does not apply where there is no question of instituting a suit for possession against the party claiming title by prescription—*Muhammad Mumtaz Ali v. Mohan Singh*, 45 All. 419, 425 (P.C.), 74 I.C. 476, 21 A.L.J. 757.

244. Extinguishment of right :—The Indian Limitation Act lays down a rule of substantive law in section 28. It declares that after the lapse of the period provided by this enactment, the *right itself* is gone and the title ceases to exist, and not merely the remedy. Therefore, unless the plaintiff in a redemption suit gives *prima facie* evidence to show that his suit is brought within the time allowed by the Act, he fails to show that he has a subsisting right to the property in suit, or in other words, he fails to prove his title—*Parmanand v. Sahib Ali*, 11 All. 438 (F.B.). Want of possession for 12 years after the date of purchase would extinguish the purchaser's title—*Lakshman v. Bisan*, 15 Bom. 261. Where, in spite of an auction sale, the judgment debtor remained in possession for more than twelve years after the confirmation of sale, and thereafter the auction purchaser obtained a sale-certificate and obtained formal delivery, *held* that the auction-purchaser's title had become extinguished, and that the subsequent obtaining of formal delivery of possession was of no avail, as his right commenced from the date of confirmation of the sale and not from the date of the sale-certificate—*Mahmudunnisa v. Syed Zahid Raza*, 11 O.L.J. 466, 1 O.W.N. 139, A.I.R. 1925 Oudh 20. A suit to recover the office of trustee of a temple involves a claim to the possession of the temple properties, and if such suit is barred by Art. 124, the right to the possession of the properties is lost—*Govindasami v. Dakshinamurthi* 35 Mad. 92. *Ram Piari v. Nand Lal*, 39 All. 636, *Kassim Hassan v. Hazra Begum*. 32 C.L.J. 151, 60 I.C. 165.

Twelve years' adverse possession of land by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner but confers a good title upon the wrong-doer—*Gossain Das v. Issur Chandra*, 3 Cal. 224, (226), *Abhoy v. Kally*, 5 Cal. 949, *Jagrani v. Ganeshi*, 3 All. 435, *Daya Ram v. Badli Mal*, 16 P.R. 1886. The title which is acquired by adverse possession is a new title, in strictness of law, it is not the old title which is transferred to the new owner, but only a title corresponding in quantity and quality to the old title. Therefore, if the property of which there has been adverse possession is a leasehold subject to a rent and to covenants, the new owner is not liable as an assignee of the lessee to that rent or to those covenants, but he is liable on the ground that the lessor's right to the rent and his right also to re-enter under the proviso for re-entry are not prejudiced by the adverse possession which has only been between the lessee and the adverse possessor—Banning, 3rd Edn., pp. 84-85.

work a forfeiture in favour of Government—*Rajah of Venkatagiri v. Isakapalli*, 26 Mad. 410 (417). This section is inapplicable where the plaintiff could only have sued to set aside certain instruments or for a declaration that they were not binding on him, and not for possession, the possession remaining with the plaintiff—*Chintaman v. Bhagvan*, 30 Bom. L.R. 1095, A.I.R. 1928 Bom. 383 (384). Similarly, the act of the Government in possessing the land of the plaintiffs and maintaining a ferry over it, when there is no intention to oust the plaintiffs from the ownership of the land, is merely an act in the exercise of a right of easement and does not constitute adverse possession so as to bring into operation the rule of 12 years' limitation; consequently the plaintiffs are not required to bring a suit for possession within 12 years, on pain of losing their property under this section; they can bring a suit for injunction against the Government within 20 years (i.e. before the Government acquires an easement)—*Pardip Singh v Secretary of State*, 5 P.L.J. 500, 1 P. L. T. 395, 57 I.C. 516.

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Where the plaintiff as the agent of the defendant (landlord) let out the land to a tenant who was in possession, and the plaintiff for more than 12 years appropriated to himself the rents collected and asserted a title in himself, and then brought a suit for possession on the ground of acquisition of title by adverse possession, held that so long as the tenant held possession under the tenancy he was the tenant of the defendant (landlord) and so long as actual possession was with the tenant,

before the date of insolvency, and for more than 12 years after the insolvency, the official assignee not having taken possession, *held* that the insolvent has acquired a right by adverse possession—*Suja Hossein v. Monohar Das*, 24 Cal 244. Where a suit brought by a ward after attaining majority to set aside an alienation made by his guardian and to recover the property alienated, is barred under Article 44, the right of the ward to the property is also extinguished by the operation of this section. See Note 331 under Article 44.

PART V

SAVINGS AND REPEALS.

Savings. 29. (1) Nothing in this section shall affect section 25 of the Indian Contract Act, 1872.

(2) *Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first Schedule, the provisions of section 3 shall apply as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—*

(a) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as and to the extent to which, they are not expressly excluded by such special or local law; and,

(b) the remaining provisions of this Act shall not apply.

(3) Nothing in this Act shall apply to suits under the Indian Divorce Act.

(4) Sections 26 and 27 and the definition of "easement" in section 2 shall not apply to cases arising in territories to which the Indian Easements Act, 1882, may for the time being extend.

245. Change in the law :—Sub-section (2) has been amended by the Indian Limitation Amendment Act (X of 1922).

It originally stood thus :—

"Nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India."

The Select Committee gave the following reasons for the change :—
"We have carefully considered each section in parts II and III of the Act for the purpose of deciding whether it should apply to periods of limitation prescribed by special or local laws or not. We think provi-

sion should be made that section 4, sections 9 to 18 and section 22 should apply, unless they are expressly excluded by the special or local law, and that the remaining provisions of the Act should not apply. This will, of course, not preclude amendments of special or local laws with a view to the application of such provisions"—*Gazette of India*, 1922, Part V, page 74.

The effect of this change and the cases overruled or modified thereby have been pointed out in the notes to sections 3, 4, 5, 6, 12, 14, 15 and 18.

The phrase "the remaining provisions of this Act shall not apply" can only mean that the remaining provisions of this Act shall not apply unless they are expressly made applicable by the special or local Act. To hold otherwise is to hold that it is a prohibition of the future as well as the past application of those provisions by a special or local Act, which is obviously impossible. The amendment of sec. 29 of the Limitation Act in 1922 did not restrict its scope but extended it. Under the old section 29, none of the provisions of the Limitation Act were applicable unless they were expressly included by the special or local Act. Under the new sec. 29, some of them are applicable without being expressly included, unless they are expressly excluded, the rest remain, as before, applicable only when they are expressly included—*Madho Rao v. Balaji*, 91 I.C. 563, A.I.R. 1926 Nag. 236.

The term "expressly excluded" means specifically mentioned as excluded. Unless an express reference is made in the special or local law to the sections of the Limitation Act and by that reference they are expressly excluded, they would apply to the special or local law—*Raja Sati Prasad v. Gobinda*, 33 C.W.N. 227 (229), A.I.R. 1929 Cal. 325.

The Limitation Act is not intended to apply to applications under the Provincial Insolvency Act 1920, because that Act is a complete Code on the insolvency law applicable to the areas to which it applies, and prescribes its own period of limitation. Where no period of limitation has been prescribed in the Prov. Insolvency Act for applications by creditors to be brought on the schedule of creditors, the matter is intended to be left to the discretion of the Insolvency Court, but no Article of the Limitation Act would apply to such applications—*Jhan Bahadur v. Bailiff*, 5 Rang. 384, 104 I.C. 816, A.I.R. 1927 Rang. 263.

30. 31. [Repealed by the Repealing and Amending Act, VIII of 1930].

These two sections (which provided a special period of limitation for those suits for which the period prescribed by the Act of 1908 was shorter than the period prescribed by the Act of 1877, as well as for suits for sale on simple mortgages) have been omitted, as they are obviously spent.

32. [Repealed by the Amending and Repealing Act XVII of 1914].

THE FIRST SCHEDULE.

(See Section 3).

FIRST DIVISION: SUITS.

253. The periods of limitation prescribed in this schedule are to be computed subject to the provisions contained in the body of the Act *Dhonesur v. Roy Gooder*, 2 Cal. 336 (F.B.).

If a suit falls under two Articles of the Limitation Act, the more general and the other more particular and specific, the latter Article will apply on the principle "*Generalia specialibus non derogant*" (the special excludes the general)—*Sharoop v. Jogessur*, 26 Cal. 564, 5 (F.B.); *Madras Steam Navigation Co. v. Shalimar Works*, 42 Cal. (108); *Venkatasubba v. Asiatic Steam Navigation Co.*, 39 Mad. 1, (11); *Mangu v. Dolhin*, 25 Cal. 692; *Municipal Board v. Goodall*, 26 All. 41. See Note 6 at p. 6 ante.

Part I.—Thirty days.

Description of Suit.	Period of limitation.	Time from which period begins to run.
1.—To contest an award of the Board of Revenue under the Waste Lands (Claims) Act, XXIII of 1863.	Thirty days.	When the notice of the award is delivered to the plaintiff.

The period of 30 days prescribed by this Article cannot be extended by the Court by any order of its own—*Taranath v. Collector*, 5 W. (Waste Land Court Ref.) 1. But sec. 29 of this Act now makes certain sections applicable to special laws. This Article contemplates a suit to contest an award, and not an application to set aside an award; consequently the time taken in obtaining a copy of the award cannot be deducted under sec. 12 (4). If no suit is brought within the period prescribed by this Article, the order of the Board becomes final, under sec. 5 of the Waste Land Claims Act (XXIII of 1863).

Part II.—Ninety days.

- 2.—For compensation Ninety When the act or omission takes place.
 for doing or for days.
 omitting to do an
 act alleged to be
 in pursuance of
 any enactment in
 force for the time
 being in British
 India.

This Article may be compared with the Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61), sec. 1.

254. Application of Article:—This Article applies where the defendant professes to do an act *bona fide* in pursuance of an enactment; it does not apply where the defendant knows that he has not, under a statute, authority to do a certain thing, and yet knowingly and intentionally does that thing in contravention of the provisions of the Statute—*Ranchordas v. Municipal Commissioner*, 25 Bom 387 (393); *Maung Kyaw v. Maubin Municipality*, 3 Rang. 268, 4 Bur. L J 139, A.I.R 1925 Rang. 311. The intention of this Article is to meet those cases where the defendant does an act injurious or possibly injurious to another, under powers conferred or honestly believed to be conferred by some Act of the Legislature. It does not apply to a case where the damages arise not from the doing of the act or from the failure to do it, but from doing it in an improper manner out of malice and carelessness. Such a case would be governed by Article 36—*Waliulla v. Raj Bahadur*, 16 O.C. 211, 21 I C 426. A suit for damages against a Municipality for malicious prosecution will be governed by this Article, if the defendant Municipality has acted in the honest belief that it was empowered to institute the prosecution by the Municipal Act, if at the time it instituted those prosecutions the defendant Municipality knew that it had no power to prosecute, then the suit would be governed by Article 23—*Maung Kyaw v. Maubin Municipality* (supra). The statutory protection is intended for the benefit of persons who intend to act right but by mistake act wrong—*Parton v. Williams* (1820) 3 B & A 330, *Hughes v. Buckland*, (1846) 15 M & W 346 (per Pollock C B), *Lightwood*, p. 392.

In order to enable a defendant to take advantage of the shorter period of limitation prescribed by this Article, he must allege and shew that he had reasonable grounds for justifying his action under the particular enactment relied upon by him and not that he arbitrarily asserted or thought so. He must have assumed to act in the honest exercise of a supposed statutory power—*Ganesh v. Elliot*, 124 P.R. 1891, *Narpat Rai v. Sardar Kripal*, 65 P.R. 1886, *Punjab Cotton Press Co. v. Secretary of State*, 4 Lah. 428, A.I.R. 1924 Lah. 169, 79 I C 208. The reasonable-

ness of the belief is immaterial if he honestly believed in the existence of those grounds, though it is an important element in determining the question of honesty—*Ganesh v. Elliot*, 160 P.R. 1883; *Roberts v. Orchard*, (1863) 2 H. & C. 769, *Heath v. Brewer*, (1864) 15 C.B.N.S. 803. A person acting under statutory powers may erroneously exceed the powers given or inadequately discharge the duties imposed by the Statute; yet if he acts *bona fide* in order to execute such powers or to discharge such duties, he is to be considered as acting "in pursuance" of the Act, and is to be entitled to the protection conferred upon persons whilst so acting—*Smith v. Shaw*, (1829) 10 B. & C. 277.

This article is not intended to apply only to those cases in which the defendant at the time of doing the act, informs the other party in so many words that he is acting under such and such a provision of law. The article being evidently intended to allow protection to persons doing acts in pursuance of some enactment in force, it is sufficient for them to show that in doing the act they were at the time under the honest belief that their act was authorised by some Statute—*Richard Watson v. Municipal Corporation of Simla*, 72 P.R. 1909, 108 P.L.R. 1909, 2 I.C. 819.

This Article gives protection not only to acts done but also to acts omitted. See also *Wilson v. Mayor of Halifax*, (1868) L.R. 3 Ex. p. 119.

This Article is wide and general in its terms and must be read subject to the provisions of any specific Article, *i.e.* it should not be applied where there is a more specified Article applicable to the case. Thus, it is not applicable to a suit against a Municipal Board for compensation for illegal or excessive distress; such a suit would be more properly governed by Art. 28—*Municipal Board v. Goodall*, 26 All. 482.

255. Compensation :—For the meaning of this word, see Note 305 under Article 29. In the cases cited therein it has been pointed out that according to some High Courts, the term 'compensation' should be applied to those cases in which the plaintiff does not claim only the specific amount realised by the defendant, but a much larger sum by way of damages to be assessed by the Court; whereas according to some other Courts the word should be interpreted in a much wider sense and would cover all cases whether the plaintiff asks only for a refund of the specific sum of money realised by the defendant, or for damages to be assessed by the Court for the defendant's wrongful act. In *Rajputana Malwa Railway Stores v. Ajmere Municipal Board*, 32 All. 491 the word was applied in the former sense, and it was held that a suit to recover the excess amount of duty realised by the defendant-Municipality from the plaintiff (and not to recover any damages) was not a suit for 'compensation' under this Article but would fall under Article 62. This case was followed in *Municipal Board v. Deokinandan*, 36 All. 555, 12 A.L.J. 952, 25 I.C. 943.

256. Cases :—Where a certain Municipality asked the Magistrate to direct the removal of a hut under section 144 of the Cr. P. Code on

the ground that it was dangerous and insanitary, and the Magistrate after a full inquiry on the spot passed an order for demolition, it was held that a suit for compensation for damage caused by the order of the Magistrate purporting to be under sec. 144, Cr. P. Code fell under this Article—*Hari v. Surendra*, 18 I C. 84 (Cal.). A suit for damages against a Municipality for an alleged omission to repair a road quickly, and for closing the road at both ends which injured the business of the plaintiff, is governed by this Article—*Municipal Board v Behari Lal*, 24 A.L.J. 682, A.I.R. 1926 All 538, 95 I C 1030. In execution of a simple money decree, certain immoveable property belonging to the plaintiff was advertised for sale. On the date fixed for sale, the *amin* came to sell the property. Before the sale, the plaintiff tendered the decretal amount to the *amin*, but the latter wrongfully refused to accept the money and went on with the sale. The sale was subsequently set aside on plaintiff's application under O XXI, r 89, C P. Code. He then brought a suit for damages against the *amin* 19 months after the date of sale. It was held that the suit fell under Article 2 (and not 36) because the whole foundation of the plaintiff's claim was the alleged omission by the defendant to perform a duty imposed by the C P. Code, i.e. the omission to accept the decretal amount and stop the sale. The suit was therefore barred—*Mukat Lal v. Gopal Sarup*, 41 All 219, 16 A.L.J. 1017, 48 I C 815. A suit for damages for wrongful attachment of standing crops does not fall under this Article but under Article 36—*Hari Charan v Hari Kar*, 32 Cal 459 (461), 9 C W N 376.

Where bricks were wrongfully seized and used by a Municipal Committee, but not in the exercise of any powers conferred upon them by the Municipal Act, a suit to recover the value thereof need not be brought within three months—*Harbhagan v Hassan* 79 P R 1884.

257. Any enactment in force :—Article 2 applies to suits for compensation only when the act or omission complained of was done in pursuance of some enactment in force for the time being in British India. The defendant will have to show that what was done by him falls within the provisions of some Act of the Legislature. Where the canal authorities (defendants) cut the bank of a canal to avoid accident to the adjoining railway, and not to the canal, and the plaintiff's adjacent mills were destroyed, held that the defendants' act did not fall under the Canal Act, and Article 2 was therefore not applicable—*Punjab Cotton Press Co., Ltd v Secretary of State*, 10 Lah 161 (P C), 28 P L R 453, 31 C W N 835 (837), A I R. 1927 P C 72, 103 I C 1. It is not enough for the defendant pleading the Article in bar of a suit, to assert that he honestly believed that the Act, in pursuance of which the alleged acts were committed, was in force. He must show that the Act was actually in force at the time and place of the acts complained of—*Jai Ram v. Gurmukh*, 105 P.R. 1886.

258. Starting point of limitation :—When the cause of action depends on the happening of special damage, it accrues when the damage happens, and not at the time of the act which causes it—

Backhouse v. Bonomi, (1858) 9 H.L.C. 503; *Lightwood*, p. 398. See Sec. 24. If the damage results to the plaintiff's estate not immediately but after the lapse of some months after the acts of the defendant, the accrual of the cause of action is postponed under section 24 until such time as the damage occurs; in such a case the plaintiff's suit must be brought within 90 days from the time when damage accrues to the plaintiff from the defendant's acts—*Richard Watson v. Municipal Corporation*, 72 P.R. 1909, 2 I.C. 819. The *terminus a quo* in calculating limitation is the date of the damage and not the date of construction of the work which caused the damage—*Punjab Cotton Press Co. v. Secretary of State*, 4 Lah. 428 (430), A.I.R. 1924 Lah. 169, and 4 Lah. 432, A.I.R. 1924 Lah. 192, 79 I.C. 185, *cf. Dwarka v. Corporation of Calcutta*, 18 Cal. 91.

Part III.—Six months.

- 3.—Under the Specific Relief Act, 1877, section 9, to recover possession of immoveable property. Six months. When the dispossession occurs.

259. Section 9 of the Specific Relief Act contemplates summary suits to recover possession, independently of any question of title, if a question of title is raised, the suit will not fall under section 9—*Ramasami v. Paraman*, 25 Mad. 448, and will not be governed by this Article.

It has been held in some cases that if the plaintiff brings a suit on the basis of possession only, and is unable to make out a title, such suit must be brought under sec. 9 Specific Relief Act within six months from the date of dispossession. If the plaintiff comes in after six months, he can succeed only on proof of some title. Mere anterior possession is not enough—*Nand Kishore v. Sheo Dayal*, 11 W.R. 168, *Grant v. Bunshee*, 15 W.R. 38; *Debi Churan v. Issur*, 9 Cal. 39; *Ertaza v. Bany Mistry*, 9 Cal. 130; *Krishnarav v. Vasudev*, 8 Bom. 371; *Pemraj v. Nibaran*, 6 Bom. 215; *Bapuji v. Bhagwant*, 42 Bom. 357 (358). But in several other cases it has been held that, if the plaintiff (bringing a suit after the expiry of 6 months) shows a previous possession, and nothing more, such possession is *prima facie* sufficient evidence of title against a trespasser—*Mohabeer v. Mohabeer*, 7 Cal. 591; *Hanmantrav v. Secy. of State*, 25 Bom. 287; *Narayana v. Dharmachar*, 26 Mad. 514; *Nisa v. Kantiram*, 26 Cal. 579.

Where a non-occupancy raiyat has been dispossessed of his holding by a trespasser or by his landlord otherwise than in execution of a decree, then if his tenancy has not yet been determined, he has a title to the land, *viz.* the title of a tenant, and a suit by the raiyat to recover possession by establishment of his title is not a suit under section 9 of the Specific Relief Act; consequently Article 3 cannot apply, but either

Art. 120 or 142—*Tamizuddin v. Ashrub Ali*, 31 Cal. 647, 651 (F.B.) (overruling *Bhagabati v. Luton Mandal*, 7 C.W.N. 218).

- 4.—Under the Em- Six When the wages, hire
ployers and Work- months. or price of work
men (Disputes) claimed accrue or
Act IX of 1860, accrues due.
section 1.

Part IV.—One year.

- 5.—Under the sum- One When the debt or liqui-
mary procedure year. dated demand be-
referred to in sec- comes payable or
tion 128 (2) (f) of when the property
the Code of Civil becomes recoverable.
Procedure, 1908,
*where the provi-
sion of such sum-
mary procedure
does not exclude
the ordinary pro-
cedure in such
suits, and under
O. XXXVII of the
said Code.*

259A. Change:—The italicised words have been added in Article 5, and the period of limitation has been extended from six months to one year, by the Indian Limitation Amendment Act XXX of 1925. The reasons have been thus stated "Article 5 of the First Schedule to the Indian Limitation Act 1908 (IX of 1908) provides a period of limitation of six months for a suit under the summary procedure referred to in section 128 (2) (f) from the date on which the debt or liquidated demand becomes payable or when the property becomes recoverable. As the Article stood in the Act of 1877, it referred to suits on negotiable instruments under Ch. 39 of the Code of Civil Procedure of 1882. In the Code of 1908 powers were given in section 128 (2) (f) to High Courts to extend the summary procedure, and a reference to that section was substituted for Chapter 39 of the Civil Procedure Code, when the Limitation Act was consolidated in 1908. The fact that the provisions of chapter 39 of the Code were also retained in Order 37 of the new Code of Civil Procedure seems to have been overlooked. Accordingly if Article 5 is strictly construed, it applies now only to suits under the summary procedure made by rules under sec. 128 (2) (f) of the Code since the Code was enacted."

The Bill proposes to make the intention clear, and to make a similar consequential change in Article 159 of the same Schedule. The Bill further proposes to extend the period of limitation now fixed in Article 5 for suits to which the summary procedure applies from six months to one year, as the existing period has been represented to be too short"—*Statement of Objects and Reasons* (Gazette of India, Part V, page 181).

This amendment has been made as a result of the recommendation of the Civil Justice Committee. See the Civil Justice Committee Report, pp. 489-490. The case of *Rabindra v. Abdul Ahad*, 52 Cal. 954, 29 C.W.N. 589, A.I.R. 1925 Cal 781, 88 I.C. 400 in which it was held that suits under O. 37, C. P. Code were not governed by Article 5, is hereby overruled.

6.—Upon a Statute, Act, Regulation or Bye-law for a penalty or forfei- ture.	One When the penalty or year. forfeiture is incurred.
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260. A suit for the recovery of a fine imposed under the terms of a contract or agreement is a suit based on contract and is governed not by Article 6 but by Article 68 or 115—*President of Taluk Board v. Lakshminarayana*, 31 Mad. 54; see also *Meri Lal v. Mukhta*, 3 P.R. 1875. A suit for recovery of profession tax under the Towns Improvement Act (III of 1871) is not governed by this Article, the same not being a penalty or forfeiture—*President of Municipal Commission v. Padriarazu*, 3 Mad. 124. A clause in a lease from the Government entitling the lessees to certain grazing fees and authorising them to impound and levy an extra fee in the case of cattle grazed without permission, is a 'by-law' within the meaning of this Article—*Meri Lal v. Mukhta*, 3 P.R. 1875.

This Article applies to a suit for penalty under a Statute, Act, etc.: a penalty in a bond does not fall under this Article. Further, it applies to pecuniary penalties and forfeitures: therefore a suit for possession of immovable property to which the plaintiff is entitled by reason of any forfeiture or breach of contract is not governed by this Article but by Article 143.

7.—For the wages of a household servant, artisan or labourer not provided for by this schedule, Article 4.	One When the wages accrue year. due.
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261. Scope :—This article is applicable only to a suit for wages brought by a servant against the master, and not to a suit brought by one servant against a superior servant who has drawn the wages of the whole establishment from the master and has failed to pay therefrom

the portion due to the plaintiff—*Siva Ram v. Turnbull*, 4 M.H.C.R. 43; *Abhaya Charan v. Haro Chandra*, 13 W R 150 Such a suit falls under Art. 62

262. Wages.—The term wages is confined to the earnings of labourers and artisans, and the word 'salary' is used for payment of servants of higher class—*Gordon v Jennings*, (1882) 9 Q B D. 45 In ordinary language the term 'wages' is usually restricted to the remuneration for mechanical or muscular labour, specially to that which is ordinarily paid at short intervals—U N. Mitra's Limitation, 5th Edn. p. 871. A suit by a painter for the price, when there is an agreement to pay a certain price for the whole work done upon delivery and acceptance, is not a suit for wages under this article—*Virasvami v Sayambabay*, 2 M H C R 6

263. Household servant.—This section does not apply to all servants, but only to household servants A *bisardar* in Oudh is not such a servant,—*Ghasi Ram v Uma Datt*, 26 O C 327, 79 I C 576, A I.R. 1924, Oudh 189 A cook is a domestic servant, although he may be an expert in cooking, and a suit for wages brought by him is governed by this Article—*Kuppu Rao v Narasier*, 2 L W 723, 28 I C. 956 A wet nurse is not a domestic servant and a suit by her to recover her wages falls under Art 102—*Mohan v Jumerat* 10 A L J 395, 17 I C 658 A weighman employed to do work in a shop is not a household servant nor an artisan nor a labourer—*Mutsaddi v Bhagwan*, 48 All 164, 23 A L J 1059 (cited below) A person whose duties are to sweep and clean a temple provide flowers for daily worship and garlands for the idol is not a household servant—*Bhavathradon v Rama*, 7 Mad 99, *Baradwaja v Arunachala* 41 Mad 528, nor is one so whose duty is to instruct in fencing and wrestling—*Pylwan v Jenaka*, 8 M H.C.R. 87.

Where a servant is appointed on a fixed monthly salary, limitation commences from the end of each month and not from the date of the dismissal of the servant—*Kali Churn v Mahomed Saleem*, 6 W.R. (Civ. Ref.) 33 A suit for wages as a domestic servant must be brought within one year after the same became due. But where the master, instead of paying the salary to the servant then and there gives credit in his account books and treats the servant as his creditor, the law of limitation applicable is not that under Art 7 but the ordinary rule of limitation as to debtors. It is the same as if the master gave a pro-note to his servant for wages—*Chinnan v Vilathan* 27 L W 30, A I R 1928 Mad 27, 106 I C 229

264. Artisan —According to Webster's Dictionary, an artisan is one trained to mechanical dexterity in some mechanical art or trade A motor-car driver is an artisan, because he is required to know how to start the car, how to steer it and how to stop it, and for such purposes he must possess some skill in manipulating the different parts of the mechanism—*Sewaram v Lakshminarayan* 5 Rang 477, A I R 1927 Rang 279, 104 I C. 520 A mechanical engineer is not an artisan within the meaning of this Article The word 'artisan' means a mechanic or a

workman who has acquired some manual skill, and does not mean persons undertaking higher classes of work which involve responsibility and intellectual training. A suit by an engineer for wages would be governed by Article 102—*Navalmal v. Mangaldas*, 12 S.L.R. 140, 50 I.C. 37.

265. Labourer :—A workman or labourer is one who enters into a contract to employ his personal services and to receive payment for that in wages—*Riley v. Ward*, 2 Exch. 59. A labourer is a man who digs and does other work of that kind with his hands. But a carpenter is not a labourer because though he works with his hand, his work requires skill and training—*Morgan v. London General Omnibus Co*, (1884) 13 Q.B.D. 832. A labourer is a servant in husbandry or manufacture not living *intra maenia*, who labours in a toilsome occupation and does work that requires little skill, as distinguished from an artisan (*Bouvier's Law Dictionary*, Vol 2, p 1819). A person who is a contractor or sub-contractor and who engages to get work done but does not engage in any work himself is not a workman or labourer—*Gilby v. Subbu Pillai*, 7 Mad 100, *In re Bal Krishna*, 10 Bom 196. A man who agrees, in consideration of the use of the land and a share of the produce for the season, to provide seed and labour and carry on the cultivation of the land, is not a labourer—*Andi Konan v Venkata Subbayan*, 2 M.H.C.R. 387. A weighman employed to work at a shop cannot be treated as a mere labourer, employed to do task work, that is, to hold the scales and weigh goods in a shop for a monthly salary. He can be asked to do other work of the shop when free. He has to count and add up and calculate the price on the total quantity weighed, and his work cannot therefore be treated as purely manual labour. He may be regarded as a shopkeeper's assistant, and Article 102 applies to a suit by him to receive his dues from the shopkeeper—*Mutsaddi v. Bhagwan*, 48 All. 164, 23 A.L.J. 1059, A.I.R. 1926 All 172, 90 I.C. 120.

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| 8.—For the price of food or drink sold by the keeper of a hotel, tavern or lodging house. | One year. | When the food or drink is delivered. |
| 9.—For the price of lodging. | One year. | When the price becomes payable. |
| 10.—To enforce a right of pre-emption, whether the right is founded on law or general usage, or on special contract. | One year. | When the purchaser takes under the sale, sought to be impeached, physical possession of the whole of the property sold, or, where the |

subject of the sale does not admit of physical possession, when the instrument of sale is registered.

266. Scope:—In certain earlier Allahabad cases it was held that the sale referred to in this Article was a sale *ab initio*, i.e., an absolute sale having immediate effect and operation and that this Article did not apply to a mortgage by conditional sale which became a sale only on foreclosure. A suit for pre-emption in the latter class of sale was held to be governed by Article 120. See *Nath Prosad v Ram Pallan*, 4 All. 218 (F.B.), *Rasik Lal v. Gajraj*, 4 All. 414; and *Asik Ali v Mathurakunda*, 5 All. 187. But this view has been disapproved of in the Full Bench case of *Batul Begum v. Mansur Ali*, 20 All. 315 (319). In this case the Judges have observed (at p. 319): "We cannot see how a sale is any the less an absolute one because it is not to take immediate effect and operation. There is certainly nothing in Article 10 to suggest that the sale mentioned in that article is limited to a sale which is to have immediate effect and operation. In our opinion, the other conditions being present necessary to make Article 10 applicable, Article 10 would apply to a sale which in its inception was a mortgage by conditional sale, but which either by the operation of Reg XVII of 1806 or by the operation of Act IV of 1882 (Transfer of Property Act) had become in effect an absolute sale with the right of redemption gone. In such a case, the other conditions existing, Article 10 would apply as soon as the mortgagee had acquired the complete interest of the mortgagor."

267. Pre-emption —The right to pre-emption arises when the sale becomes complete i.e., when there is an entire cessation of right on the part of the vendor—*Baksha v Tofer*, 20 W.R. 216. Therefore no right of pre-emption can arise on a mere conditional sale or mortgage so long as the right of redemption remains with the mortgagor—*Goordyal v. Rajah Teknarain*, 2 W.R. 215.

The word 'pre-emption' in this Article refers only to those cases in which the vendor has actually purchased the property, and not to those cases where the intending purchaser has not yet completed his purchase, because the third column of this Article does not provide a starting point of limitation for a case in which the sale has not taken place. Where the intending purchaser has only intended or contracted to purchase the property, a suit for pre-emption (i.e., to enforce the plaintiff's claim to purchase) is governed by Article 120, and the right to sue accrues under that Article when the plaintiff first becomes aware that the vendor did not intend to sell the land to him—*Rai v Sidakali*, 65 I.C. 919 A.I.P. 1922 Nag. 14.

When a document was really a deed of sale, but was thereon called a *hiba bil-awaz*, it was held to be an instrument of sale with no pre-emption

runs from the date of registration of the sale-deed, and not from the date when the vendee subsequently takes possession from the mortgagees—*Narendra v. Wali Muhammad*, 28 I C 208, 2 O.L.J. 109; *Tikaya Ram v. Dharam Chand*, 45 P.R. 1895, *Viswanathan v. Ethirajulu*, 45 M.L.J. 389, A.I.R. 1924 Mad 57, 76 I.C. 467. Where the property, at the date of sale, is in the possession of the holder of a particular or intermediate estate e.g., an usufructuary mortgagee or a tenant for a time, the property is not capable of immediate physical possession by the purchaser—*Jairam v. Sitaram*, 16 N.L.R. 37 (F.B.); 52 I.C. 940.

Where the whole of the property is not capable of physical possession at the time of sale, the period of limitation commences from the date of registration of the sale-deed—*Umar Baksh v. Choghatta*, 156 P.R. 1882. The words 'takes physical possession' must be construed as meaning 'takes physical possession of the whole land'; where the vendee takes possession of the different portions of the property at different periods, time runs from the last date, when he obtains possession of the whole of the property—*Dewa v. Dia Ram*, 98 P.R. 1876.

Symbolical possession is not tantamount to physical possession—*Achutananda v. Biki Bibi*, 1 Pat. 578 (581), A.I.R. 1922 Pat. 601, 4 P.L.T. 277, 69 I.C. 666

When the property is not capable of physical possession, limitation runs from the registration of the sale-deed and not from any subsequent date on which the parties have by mutual consent rectified the wrong description given in the sale deed of the property sold—*Ganga Ram v. Sardara*, 64 P.L.R. 1916, 35 I.C. 278. Thus, where at the time of mutation, the parties to the sale-deed agreed that the *khassra* numbers different from those entered in the deed numbers were intended to be sold and mutation was accordingly effected, the starting point of limitation was the date of registration of the sale-deed, and not the date of the mutation—*Ibid*; *Kali Shankar v. Raghubir*, 9 I.C. 309 (All.).

269. Registered sale-deed :—A sale-certificate granted under sec. 316 C. P. Code (1882) is not an instrument of sale for the purposes of this Article, as it does not apply to a sale in execution of a decree; even if it be so regarded, still a copy of the certificate forwarded to the registering officer, in accordance with sec. 89 of the Registration Act, and duly filed in the register of non-testamentary documents relating to *immoveable property prescribed in sec. 51 of the Act*, is not a 'registered' document within the meaning of this Article—*Fatch Singh v. Dropodi*, 142 P.R. 1908. It is immaterial for the purposes of this Article whether the registration was effected with or without the consent of the vendor. In either case, the starting point of limitation is the date of registration—*Nagina Singh v. Duni Chand*, 62 I.C. 797 (Lah.).

Date of registration :—Limitation for a suit for pre-emption depending on registration begins from the date when the certificate required by sec. 60 Registration Act is signed and dated by the registering officer on the document, and not from the date on which the document is presented for registration, nor from the date when the registering

officer signs under sec. 59 the endorsements made under secs. 52 and 58 of the Act embodying admission of execution—*Karm v. Fazl*, 10 P R 1881; *Bhanjan Ram v. Gopal Ram*, 92 P R 1906. A sale-deed was registered at G on 6th October 1921. Only a very small portion of the property sold was situated in G. The rest of the property was situated in B. After registration at G, the registration office at B was informed of the registration and an entry was made by the Sub-Registrar of B in his register on the 24th November 1921. Held that time began to run from 6th October, which was the date of registration, and not from 24th November 1921 on which a mere entry was made in the register of B.—*Sheopujan v. Mangu*, 23 A.L.J. 104, A.I.R. 1925 All. 324, 86 I.C. 130.

270. Possession by vendee or pre-emptor before sale :

—Where prior to the execution and registration of the sale deed, actual possession of land was taken by one of the vendees under a convenient arrangement, limitation for the purpose of the pre-emption suit ran from the date of the actual sale (i.e., execution of the sale-deed); and the prior possession of one of the vendees must in law be referred to the subsequent deed of sale—*Ram Peera v. Rup Lal*, 80 P.R. 1918, 48 I.C. 102. Where the pre-emptor had already been in possession of the land (originally under an agreement and afterwards as a trespasser), and there was no registered deed of sale, a suit for pre-emption was held to be governed by Article 120 and not by this Article—*Velayudhan v. China Velayudhan*, 40 M.L.J. 443, 62 I.C. 27. In the Punjab, if there is no registered deed of sale, and physical possession is not given because the vendee had already been in possession of the property, but there is mutation of names, the suit for pre-emption is not governed by Article 10 or 120, but by sec. 30 of the Punjab Pre-emption Act, and time runs from the date of mutation—*Tola Ram v. Lorindra Ram*, 3 Lah 261, A.I.R. 1922 Lah 210, 69 I.C. 715; *Gurudas v. Qadir Bakhsh*, 28 P.L.R. 192, 102 I.C. 423, A.I.R. 1927 Lah. 388.

271. Where article does not apply :—Where the whole or a portion of the subject of sale is not capable of physical possession and there is no registered deed of sale, a suit for pre-emption is governed by Art. 120, and not by this Article—*Ali Gauhar v. Jawahir*, 30 P.R. 1892. Thus, a suit to enforce a right of pre-emption against a mortgagee by conditional sale who has foreclosed under Reg. XVII of 1806 is governed by Art. 120, when part of the property sought to be pre-empted is a share in an undivided zemindari mahal, and there is no registered deed of sale—*Batul v. Mansur*, 20 All. 315 (321) (F.B.), affirmed in *Batul v. Mansur*, 24 All 17 (P.C.). A suit for pre-emption in respect of an oral sale, the property sold being a share in an undivided holding not susceptible of physical possession is governed by Article 120—*Kishan Chand v. Kehr Singh*, 14 P.R. 1904. Where the property does not admit of physical possession, and being under rupees one hundred in value, is conveyed by an unregistered instrument, this article does not apply. See Whitley Stokes' *Anglo-Indian Codes*, Vol. II, p. 977. Where

the purchaser has obtained only symbolical possession but no physical possession, and there is no registered deed of sale, the property having been sold in execution of a decree, this Article does not apply—*Achutananda v. Biki Bibi*, 1 Pat. 578 (581), A.I.R. 1922 Pat. 601, 69 I.C. 666.

A suit by one pre-emptor against another for the determination of the question as to whether the plaintiff or the defendant has the better right to pre-empt the property, is not governed by this Article but by Art. 120—*Durga v. Haider*, 7 All. 167; *Ilahi Bux v. Muhammad Rab Nawaz Khan*, 80 P.R. 1912, 14 I.C. 328; *Ram Pershad v. Ganga Datt*, 20 P.R. 1908; *Mutsadda v. Hamira*, 11 P. R. 1893. This Article applies to a suit by the pre-emptor against the vendee. A suit against a transferee of the vendee fails under Article 120 and not under this Article—*Karamdad v. Ali Muhammad*, 31 P.R. 1913 (F.B.) 18 I.C. 70.

272. Right not extinguished—Defence of pre-emption :—A suit by a pre-emptor is not a suit for possession of property in respect of which he has the right of pre-emption, and therefore, the right is not extinguished by operation of section 28. Consequently, a defendant may plead his right of pre-emption by way of defence, though a suit by him to enforce such right would then be time-barred—*Kanharan Kutti v. Uthotti*, 13 Mad. 490; *Krishna Menon v. Kesavan*, 20 Mad. 305. *Contra*—*Viswanathan v. Ethirajulu*, 45 M.L.J. 389, A.I.R. 1924 Mad. 57, *Ramasami v. Chinnan Asari*, 24 Mad. 449.

11.—By a person, against whom any of the following orders has been made, to establish the right which he claims to the property comprised in the order :	<table border="0"> <tr> <td style="vertical-align: top;">One year.</td> <td style="vertical-align: top;">The date of the order.</td> </tr> </table>	One year.	The date of the order.
One year.	The date of the order.		

- (1) Order under the Code of Civil Procedure, 1908 on a claim preferred to, or an objection made to the attachment of, property attached in execution of a decree;
- (2) Order under section 28 of the Presidency Small Cause Courts Act, 1882.

This Article and the one following correspond to Art. 11 of the Act of 1877. The old Article ran thus :—“By a person, against whom an order is passed under section 280, 282 or 335 of the Code of Civil procedure, to establish his right to, or to the present possession of, the property comprised in the order—One year—The date of the order.”

273. Scope of Article :—This Article is wider in its scope than the corresponding Article of the old Act. A suit contemplated by the old Article was a suit by a person against whom an order was passed under secs. 280—282 of the C. P. Code 1882 (O. XXI, rr. 60—62 of the new Code). But Article 11 of the new Act speaks of suit by a person against whom an "order on a claim or objection" was passed, i.e. any order passed in claim proceedings, and is not restricted to an order passed under O. XXI, rr. 60—62. Therefore, where upon attachment of the properties of the judgment-debtor, a simple mortgagee of the judgment-debtor preferred a petition praying that the properties should be described in the sale proclamation as being subject to the simple mortgage in favour of the petitioner, and the petition being dismissed, he brought a regular suit to enforce his mortgage more than one year after the order of dismissal, it was held that although the objection did not purport to be put in under rule 58, and the order of dismissal was not under rules 60—62, still it was an "order on an objection" and therefore one contemplated by this Article; and the suit by the mortgagee to enforce his mortgage against the execution-purchasers and their representatives, brought more than a year after the order of dismissal is barred by this Article—*Lakshumanan v. Parasivan*, 37 M.L.J. 159, 52 I.C. 720 (721); *Vetu Padayathi v. Arumugam*, 38 M.L.J. 397, 56 I.C. 481; *Muthia Chetty v. Palaniappa*, 45 Mad. 90, 41 M.L.J. 504, 70 I.C. 432; *Devidas v. Maharaj Rupchand*, 25 A.L.J. 609, A.I.R. 1927 All. 593, 102 I.C. 792. Contra—*Ganesh v. Damoo*, 41 Bom. 64, 26 I.C. 627, (decided under the old Act) in which under exactly similar circumstances it was held that the suit did not fall under Article 11.

A property mortgaged to A was attached and brought to sale by execution by the defendant, and after the sale had taken place, A preferred a claim petition that the sale proceeds should be kept in Court deposit to satisfy his mortgage and not be paid over to the defendant. The Court dismissed the application holding that as the sale had taken place, it had no jurisdiction to hear the petition. In a suit by the plaintiff to enforce his mortgage and recover the mortgage money from the defendant, it was held that the suit did not fall under Article 11 but was governed by Article 132, because in this case there was no "order on a claim or objection" within the meaning of Art 11. The claim was preferred after the sale had already taken place, so that the proceeding was not one under O. 21, and the Court had dismissed the claim on the ground that it had no jurisdiction to hear it—*Abdul Kadir v. Somasundaram*, 43 M.L.J. 467, 70 I.C. 648, A.I.R. 1923 Mad. 76 (distinguishing 41 Mad 985 F.B., 37 M.L.J. 159 and 38 M.L.J. 397).

The word "attachment" in this Article means a *de facto* attachment, and not a mere order of attachment. Of course, such an order is a necessary preliminary to an attachment, but until the further steps prescribed in the Code have been taken in execution of it, the attachment cannot be said to have been accomplished. Unless there had been a completed attachment of this character, there can be no order on an objection made to it or a claim preferred to the property, such as is

contemplated in this Article. Without such order, there is *no terminus a quo* for the running of limitation, and therefore no limitation at all. Thus, in execution of a money-decree the Court had ordered the attachment of the property of the judgment-debtor, but no attachment was actually made, and neither the Court nor the parties were aware of the absence of the attachment. The sale-proclamation was duly issued, and a mortgagee of the judgment-debtor preferred a claim-petition that the sale should be subject to his mortgage. The claim having been dismissed, he brought a suit for sale on his mortgage, more than one year after the date of dismissal, and contended that the claim-proceedings being illegal for absence of attachment, the order of dismissal of his claim was a nullity and was not required to be displaced by a suit under Article 11. *Held* that the order was a nullity, that Article 11 was not applicable, and that the suit was not barred—*Muthia Chetty v. Palaniappa*, 55 I.A. 256, 51 Mad. 349, 55 M.L.J. 122, 32 C.W.N. 821, A.I.R. 1928 P.C. 139, overruling *Muthia Chetty v. Palaniappa*, 45 Mad. 90.

Unlike Article 11 of the old Act, the present Article does not refer to any particular section (or Order and Rule) of the Civil Procedure Code, so that this Article is general in its scope and applies to all orders in claim-proceedings, whether they are passed after full investigation under the claim sections of the Code, or are passed *without any investigation* at all. See *Gangadhar v. Abdul Majid*, A.I.R. 1923 Nag. 69, 69 I.C. 522. Thus, it is applicable where the objection of the claimant was dismissed for default of appearance and there was no investigation—*Gulab v. Mutsaddi*, 41 All. 623; *Debi Das v. Maharaj Rupchand*, 25 A.L.J. 609, A.I.R. 1927 All. 593; *Nagendra v. Phani Bhusan*, 45 Cal. 785, 23 C.W.N. 357; *Ponnuwami v. Samu Ammal*, 31 M.L.J. 247, 38 I.C. 937 (938). It is applicable where the claim or objection was dismissed under the proviso to rule 58 of O. 21, C. P. Code (without investigation) as being filed too late. A suit brought by him more than a year after the date of the order dismissing his application is barred by this Article—*Velu Padayachi v. Arumugam*, 38 M.L.J. 397, 56 I.C. 481 (483); *Nagendra v. Phani Bhusan*, 45 Cal. 785; *Narasimha v. Vijiapala*, 2 L.W. 206, 27 I.C. 944 (945); *Gobardhan Das v. Mokundi*, 45 All. 438; *Narsayya v. Lakshminarayana*, 19 N.L.R. 34, A.I.R. 1923 Nag. 187; *Venkataratnam v. Ranganayakamma*, 41 Mad. 985 (F.B.). In the last mentioned case, the Full Bench pointed out (at p. 995) that under section 283 of the old Code, the orders contemplated by the Legislature were orders passed under sections 280-282, and an order of summary rejection passed under section 278, not being specifically mentioned in sec. 283, was not conclusive and did not require to be challenged within a year; but in the present Code, the language of O. XXI, r. 63 which omits all specific reference to the previous sections or rules, is undoubtedly more general than that of sec. 283 of the old Code, and provides for all orders including orders of summary rejection made by the Court.

[In view of this change in the law in the present Article and in O. XXI, r. 63 of the C. P. Code, the following cases which were decided

under the old C. P. Code and the old Limitation Act, are no longer good law :—

Kallar v. Toril, 1 C.W.N. 24—in this case it was held that Article 11 was not applicable where the claim was disallowed by reason of the claimant failing to produce any evidence in support of his claim.

Pullamra v. Pradosham, 18 Mad. 316—in this case Article 11 was held to be inapplicable where the claim was dismissed on the ground that the claimant's property had not been attached.

Chandra Bhusan v. Ram Kanth, 12 Cal. 108—which held that Article 11 did not apply where the claim was dismissed on the ground that the boundaries of the property attached did not tally with those as given in the sale-deed produced by the claimant.

Kallu v. Brown, 3 All 504, *Kayyana v. Doosy*, 29 Mad. 225; *Sarala v. Kausala*, 31 Mad. 5,—in these cases it was held that Article 11 was inapplicable where the claim was dismissed for non-appearance.

Venkapa v. Chenbasapa, 4 Bom. 21—which held that Article 11 could not apply where the Court refused to investigate the claim.

Munisami v. Arunachala, 18 Mad. 265—in this case it was held that this Article did not apply where the claim was dismissed upon the claimant withdrawing the claim.]

Mr. Rustomji, however, is of opinion that the law has *not* been changed either under O. 21, rr. 58-63, C. P. Code, or under Art. 11 of the Limitation Act, 1908. See Rustomji, 3rd Edn, pp. 255-256.

274. Suits under this Article :—It has been held in some cases that a suit under sec 283 C. P. Code 1882 (O. 21, r. 63) is not a suit to establish title. The words "the right which he claims to the property" has been interpreted to mean the right to have the property attached and sold or the right to have the property released from attachment. They do not mean the *right or title* to the property. Therefore a suit by an unsuccessful claimant to recover possession of the property on the strength of title, brought more than one year after the date of the order, is not barred by this Article—*Morshia v. Elahi*, 3 C.L.J. 381; *Kedar Nath v. Rakhal Das*, 15 Cal 674. Rules 58 to 61 of O. 21, C. P. Code simply deal with the rights of the parties to attach the property in execution, and not the rights of the parties to the property itself. An adjudication under those rules has not the force of *res judicata* but it is only operative to conclude rights in execution. The nature of the inquiry is a summary one. Rights relating to property (which may be far beyond the pecuniary jurisdiction of the executing Court) cannot be disposed of on the claim petition. The Legislature cannot have contemplated such far-reaching consequences to an order made under such circumstances as to conclude the right and title of the parties for all time to come—*Vedalingam v. Veerathal*, 37 M.L.J. 547, 54 I.C. 530 (533). If the order passed on the claim petition decides only the question about possession, and leaves the question of title open, it cannot be said that the decision as to possession concludes title as well. The ' ' ' contemplated by O.

r. 60 is bare possession and not possession indicative of title. Consequently a suit by the unsuccessful party based on title need not be brought within one year—*Vedalingam v. Veerathal*, (supra). On the contrary it has been observed by the Privy Council: "The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought"—*Sardhari Lal v. Ambika Pershad*, 15 Cal. 521 (526) (P.C.), followed in *Najimunnessa v. Nachamuddin*, 51 Cal. 548, 39 C.L.J. 418, 83 I.C. 233, A.I.R. 1924 Cal. 744 (751), where it has been held (dissenting from 15 Cal. 674) that in a suit instituted under O. 21, r. 63, C. P. Code, the object is to establish the plaintiff's title to the property and not merely to establish his right to have the attachment released. See also the cases of *Nilo v. Rama*, 9 Bom. 35 (38); *Khub Lal v. Ramlochan*, 17 Cal. 260 (262); *Bibi Aliman v. Dhakeswar*, 1 C.L.J. 296, where a suit to recover property on the basis of title was held to be governed by this Article.

In a suit against an order on a claim petition, the plaintiff is not confined to the relief which can be given by the Court which heard the claim, but is entitled to ask both for declaration of his title to the property, and for all consequential reliefs, e.g. recovery of its value where the property had been sold prior to the order on the claim-petition. A suit to "establish" a right means a suit to establish it effectively by obtaining appropriate relief for the infringement of his right. Therefore a suit for the recovery of the value of the property sold falls under this Article and must be brought within one year—*Basivi Reddi v. Ramayya*, 40 Mad. 733 (736, 739) (F.B.), *Shiboo Narain v. Mudden Ally*, 7 Cal. 608 (612), *Sadu v. Ram*, 16 Bom. 608 (614). A decree-holder, whose attachment was raised at the instance of the alienees from the judgment-debtor of the properties attached, sued to establish his right to proceed against the properties and for a declaration that the alienations were not binding on him. It was held that the suit was governed by this Article, and was in time if brought within one year of the order raising the attachment. The fact that there was a secondary relief prayed for in the suit (*viz.* a declaration) does not take the case out of this Article, as this Article is applicable to all cases in which the main relief (*viz.* to establish his right to proceed against the property) asked for falls within its scope—*Venkateswara v. Somasundaram*, 1918 M.W.N. 244, 44 I.C. 551. Upon attachment of a property, the claimant preferred a claim that he was in possession of the property under a *mokarari* lease granted by the judgment-debtor. This claim was allowed, and the property was ordered to be sold subject to the *mokarari*. More than a year after this order, the decree-holder who purchased at the execution sale, brought a suit for a declaration that the *mokarari* was fraudulent and *benami*, and for possession and mesne profits. Held that the order of sale being a judicial determination under sec. 280, C. P. Code, 1882, the present suit ought to have been brought within one year from the date of the order, and was barred under this Article—*Rajaram v. Raghubansman*, 24 Cal. 563. A claimant whose objection is disallowed is bound to bring a suit within one year notwithstanding the

fact that he retains his possession, and if he fails to bring a suit, he is liable to be evicted by the auction-purchaser—*Badri v. Muhammad*, 1 All. 381 (F B) Claims founded on mortgages are as much within the purview of O 21, r 58 as any other claim. An order rejecting the claim of a mortgagee who applied to have the attached properties sold subject to his mortgage must be challenged within the period of limitation prescribed by Article 11—*Ponnusami v Samu Ammal*, 31 M.L.J. 247, 38 I.C. 937 (938); *Nemaagauda v Paresha*, 22 Bom. 640 (643); *Lakshumanan v. Parasivan*, 37 M.L.J. 159, 52 I.C. 720 (721); *Velu Padayachi v. Arumugan*, 38 M.L.J. 397, 56 I.C. 481 (482) A certain property being attached in execution, a mortgagee of the property objected to it on the ground that the Court should allow his mortgage to the extent of Rs. 164. The Court allowed only Rs. 64 It was held that the mortgagee was bound to establish his right to the full amount within one year from the date of the order—*Yashwant v Vithoba*, 12 Bom. 231 When in execution of a decree against a widow in respect of a mortgage executed by her, the property was attached, and the reversioner's objection to the attachment of the property mortgaged by the widow was disallowed and he sued to have it declared that the mortgage was invalid as against his reversionary interest, it was held that this Article applied and the suit was maintainable—*Sant Ram v Ganga Ram*, 1904 P.L.R. 122. But it should be noted that if the reversioner had brought no suit under this Article within one year, his right would not have been lost, because under Article 141 the reversioner's right to sue accrues only on the death of the widow. During her life-time, he is not bound to make any application for possession, and the fact that he has made an unsuccessful application for possession in the execution-proceedings and has not sued under this Article, does not debar him from filing a regular suit after the widow's death—*Tal v. Ladu*, 20 Bom. 801 Where, on the date of hearing, the claimant failed to produce evidence and wanted time, but the Court refused to grant time and dismissed the claim petition, a suit to challenge the validity of the order of dismissal must be brought within one year under this Article; if this is not done, the order would become conclusive—*Gokul v. Mohri Bibi*, 40 All. 325; *Rahim Bux v. Abdul Kader*, 32 Cal. 537.

275. Parties to suit under this Article :—*Judgment-debtor :*

—This Article does not apply to a suit by a person who was not a party to the proceedings in which the order sought to be set aside was made. *The judgment-debtor is not necessarily a party to the claim proceedings* and unless he is a party to the proceedings, any order passed therein is not conclusive against him. Therefore, a judgment-debtor who is not a party to the claim-proceedings is not bound by the one year's rule of limitation of this Article in respect of any suit which he may bring for the purpose of establishing his right to the property—*Imbichi v. Upakki*, 1 Mad. 391; *Kedar Nath v Rakhal Das*, 15 Cal. 674 (679); *Narayan v. Umbar*, 35 Bom. 275 (279); *Moidin Kutti v. Kunhi Kutti*, 25 Mad. 721 (723); *Sadaya v. Amarthachari*, 34 Mad. 533 (534); *Garava v. Subbarayudu*, 13 Mad. 366 (368); *Munshi Lal v. Bishnu*, 10 P.L.T. 581, A.I.R. 1929 Pat. 604 (605), 120 I.C. 762; *Shivappa v. Dod Nagayya*, 11 Bom. 114;

Nemagauda v. Paresha, 22 Bom. 640 (645); *Karsan v. Ganpatram*, 22 Bom. 875 (879). This view has been to some extent modified by a later decision of the Madras High Court where it has been held that a judgment-debtor will not be bound by an order on a claim petition unless he has been a party to it and also *unless the order in terms adjudicates upon his title*—*Vedalingam v. Veerathal*, 37 M.L.J. 547, 54 I.C. 530 (534). The judgment-debtor is not a necessary party to a claim proceeding, and the proper parties to such proceedings are the decree-holder and the claimant. Of course if the judgment-debtor intervenes and actively opposes the claim along with the decree-holder, and the claim petition succeeds, he may be bound by the order unless he sets it aside within one year, as the order may be then said to be passed against him also. But ordinarily it is the decree-holder's right to bring the property to sale against the claim of the claimant, and the claimant's right to have the property released, which are litigated in the claim proceeding—*Velu Padayachi v. Arumugam*, 38 M.L.J. 397, 56 I.C. 481 (483). The judgment-debtor is not a party to the claim proceedings, but persons who are parties to such proceedings and persons claiming through them do not cease to be parties to the proceedings merely because subsequent to such proceedings they happen to stand in the shoes of the judgment-debtor—*Ramu, Aiyar v. Palaniappa*, 35 Mad 35 (37).

Claimants and decree-holders :—This Article applies to suits not only by claimants but by decree-holders as well. Where, after investigation under sec. 280 of the Code, the release of the property attached was ordered as against the decree-holder, he is limited to one year within which to sue for a declaration that the property is that of his judgment-debtor—*Sardhari v. Ambika*, 15 Cal 521 (P.C.) Where the claim proceedings were decided *ex parte* by reason of the decree-holder's non-appearance notwithstanding that he was given opportunity to appear and produce evidence, and an order was made for the release of attachment after an investigation under section 280, it was held that there was an adjudication as to the merits, and a regular suit by the decree-holder for establishing that the property was that of his judgment-debtor must be brought within one year from the date of such order—*Jiwani v. Nathumal*, 28 P.R. 1910, 5 I.C. 890.

Auction-purchaser :—Although the auction purchaser was not a party to the claim proceedings, still when the claimant's objection was disallowed (and the property was sold) and he afterwards brings a suit under this Article, more than a year after the date of the order passed in the claim proceedings, the auction purchaser can come in and resist the suit. He is very much interested in obtaining a good title to his purchase, and, being a party to the suit, can take advantage of the fact that the claim was dismissed, and can raise any objection such as limitation that may serve as a bar to the maintenance of the suit—*Velu Padayachi v. Arumugam*, (supra). But the auction purchaser is not bound by the order passed in the claim proceedings, as he was not a party to that proceeding, and cannot be regarded as a representative either of the judgment-debtor or of the judgment-creditor—*Narayan v. Umbar*, 35 Bom. 275 (277).

Assignees.—A person who is an assignee of the judgment-creditor-purchaser in court sale is bound by an order against the judgment-creditor in the claim proceedings, and a suit by him must be brought within the period prescribed by this Article—*Ramu Aiyar v. Palaniappa*, 35 Mad. 35 (37). An assignee from the claimant who has been successful in the claim proceedings in releasing the property from attachment, must be made a party in a suit to set aside the order of release, if it is intended to bind him by the result of the suit—*Pratap Chandra v. Sarat Chandra*, 25 C.W.N. 544, A I R. 1921 Cal 101, 62 I C 348, 33 C L J. 201.

Claimant as defendant—The rule is that the unsuccessful objector or intervenor must *himself* bring a regular suit within a year, and if he fails to do so, and a suit is brought against him (e.g. by the auction purchaser) he cannot assert his right to the property in that suit, even though it was filed within a year of the adverse order—*Nemagauda v. Paresha*, 22 Bom 640 (644); *Bailur Krishna v Lakshmana*, 4 Mad. 302 (308), *Velayuthan v Lakshmana*, 8 Mad. 506

276. "Property":—The word 'property' includes a debt and other intangible property. When a debt not secured by a negotiable instrument is attached, a claim can be preferred by a third party and investigated under sec 278 C. P. Code, and an order disallowing the claim is subject to the operation of section 283 C. P. Code and Art. 11, Limitation Act. The words "possess" and "possession" in the claim sections of the Code include constructive possession or possession in law of debts and other intangible property, and are not restricted to properties which are capable of tangible or physical possession—*Chidambara v. Ramasamy*, 27 Mad. 67.

277. Where Article does not apply.—This Article does not apply to a case where subsequent to the order disallowing the claim, the decretal amount is paid off by the judgment-debtor and the *attachment released*, so that the claimant's interests are not affected. The reason is that as soon as the attachment is removed, there is no longer an attachment or any other proceeding in execution in which the order disallowing the claim could operate to the prejudice of the claimant. As soon as the attachment is released, the parties are restored to their *status quo ante*. The claimant in such a case need not bring a suit under this Article to establish his right to have the property released, or a suit under Article 13 to set aside the order passed in the claim proceedings; he can sue to recover possession on ground of title within 12 years—*Mamlal v. Nathalal*, 45 Bom. 561 (565), *Krishna v. Bipin*, 31 Cal. 228 (231); *Umesh v. Rajbullabh*, 8 Cal 279, *Ibrahimbai v. Kabulabhai*, 13 Bom 72, *Gopal v. Bai Divali*, 18 Bom. 241. See also *Rafi Ram v. Berhamjit*, 46 All. 45 (47), A I R 1924 All. 302, 77 I.C. 82. Similarly, a claim preferred to the attachment of property was dismissed for default in 1911. Nevertheless, the decree-holder took no further steps to bring the attached property to sale, and the execution proceedings were dismissed very soon afterwards for default, whereupon the attachment ceased. In 1918 the decree-holder issued execution against the same lands and purchased them at the auction sale. Thereupon the claimant brought the present title suit.

It was contended that the suit was barred under Article 11 as it was not brought within one year after the order of dismissal of the claim case in 1911. *Held* that the object of making a claim in execution being to remove the attachment, that object was gained when the attachment was withdrawn, and if there existed no attachment or proceeding in execution on which the order in the claim case could take effect, the claimant was not bound to bring a suit complaining of the order of dismissal of the claim, within a year after the order of dismissal. This Article did not apply and the present suit was not barred—*Najimunnessa v. Nacharuddin*, 51 Cal. 548, 39 C.L.J. 418, 83 I.C. 233, A.I.R. 1924 Cal. 744. Whether the decree is satisfied or set aside or reversed, or whether the decretal amount is paid into Court under rule 55, or whether the attachment is voluntarily withdrawn by the decree-holder, or whether the order of attachment is discharged, in all these cases the same result follows, viz the attachment of the property is released and the parties are put back in the same position in which they were before the execution proceedings were lodged, and the claimant is not bound to institute a suit under rule 63 within a year after his claim has been rejected, when the object sought by him in making the claim has been attained by the release of the property from attachment within the time limited by this Article—*Ibid*.

Where a mortgagee having attached the mortgaged property in execution of his decree the property was released under sec 280, C. P Code at the instance of a third party who alleged to have purchased the property prior to the mortgage, and then the mortgagee, more than a year afterwards, brought a suit against such third party and the mortgagor, to have his lien over the mortgaged property declared, to bring it to sale in execution of his decree alleging that the title set up by the third party was fraudulent and made in collusion with the mortgagor, and to have the order under sec 280 set aside: *held* that the right that was in litigation in the proceeding under sec 280 was the right to attach and sell the property in dispute in execution of the decree which the plaintiff had obtained against the mortgagor, and so far as that right is concerned, the present suit is barred under Art. 11, but as regards the other rights upon which the plaintiff brought the present suit, viz., that he held a mortgage prior to the purchase of the claimant, and that the purchase of the claimant was not real, the suit is not barred, as it is not a suit contemplated by sec. 283 C. P. Code and therefore does not fall under this Article—*Bukshi Ram Pergash v. Sheo Pergash*, 12 Cal. 453 (457). Where a Court refuses to investigate the claim on the ground that the proper Court for its adjudication is a Court of a higher grade, and dismisses the claim petition, such an order is not one under O. 21 rule 63, and need not be set aside by a suit brought within one year—*Lakshmi Ammal v. Kadarsan*, 41 M L J 198, 63 I.C. 431, A.I.R. 1921 Mad. 488. A debt due to A from B was attached before judgment and A was thereafter adjudged an insolvent. The attached debt was paid into Court and the Official Receiver of A's estate applied to the Court for payment of the money to him and to the attaching creditor by virtue of sec 34 of the Provincial Insolvency Act (1907). The application was

dismissed. More than a year afterwards the Official Receiver filed a suit to recover the money. *Held* that at the time of attachment the Official Receiver had no interest in the money within the meaning of O. 21 rule 59; his application therefore was not a claim petition under rules 58 to 63 of Order 21, nor was it an application under any other provision of the C. P. Code, but was a statutory claim under sec 34 of the Provincial Insolvency Act. Article 11 therefore did not govern the present suit—*Official Receiver v. Veeraraghavan*, 45 Mad 70. It should also be noted that Article 11 was inapplicable on the further ground that Official Receiver's claim was made in proceedings before judgment and not in proceedings "in execution of a decree"

This section does not apply to a case where the claimant (who is a purchaser from the judgment-debtor), having failed to set aside the attachment of the property claimed by him, subsequently brings a suit not against the auction purchaser for the recovery of the property but against the judgment-debtor for refund of the consideration money paid by him (claimant) for its purchase—*Rati Ram v. Berhamjit*, 46 All. 45, A I R. 1924 All 302, 21 A L.J. 770

Claim in attachment before judgment :—This Article applies only to an order passed on a claim to property which is attached "in execution for a decree" and not attached *before judgment*. Such an order on a claim (passed before execution) falls under O 38, rule 8 and need not be set aside like an order under O 21, r 63, and the party against whom such an order is passed is not precluded from asserting his rights to the property in any other proceedings. Neither Art. 11 nor Art. 13 has any application to such an order—*Ramanamma v. Kamaraju*, 41 Mad. 23 (this case has been overruled by 41 Mad 849 on another point). But if the property is attached before judgment in a suit and is ordered to be sold in execution of the decree subsequently passed in the suit, the property may be said to be "attached in execution of the decree", and a suit to contest an order passed on a claim preferred in the execution proceedings falls under this Article—*Arunachalam v. Periasami*, 44 Mad 902 (F.B.), 70 I C 439, 41 M.L.J. 252. On an attachment before judgment being ordered, a claim petition was put in but dismissed on the 28th Feb. 1914. Subsequently the proceedings in which the attachment was obtained ended adversely to the attaching creditor in the Court of first instance on the 22nd January 1915 but was reversed on appeal in 1918, thereupon he again attached the property in 1921. Again an objection to the attachment was put in and being dismissed on the 2nd August 1921, a suit was filed on the 3rd August 1921 challenging the order. *Held* that the suit was not barred. The attachment before judgment was withdrawn upon the dismissal of the proceedings by the Court of first instance, on the 22nd January 1915, and the reversal of the judgment of dismissal on appeal in 1918 did not operate to revive the attachment which had been cancelled in 1915. And therefore, when in the execution proceedings of 1921 a fresh attachment was effected, the plaintiff had a right to prefer a fresh claim which was dismissed on 2nd August 1921, and the period of one year should be counted from this

date, and not from 28th February 1914—*Sailesh v. Joy Chandra*, 87 I.C. 756, A.I.R. 1925 Cal. 1147.

278. Starting point of limitation :—The period of limitation runs from the date of the order. A suit by the claimant for declaration of his title to the property and for recovery of the value of the property, where it has been sold prior to the order on the claim petition, is in time if brought within one year from the date of the order, though after more than one year from the date of the attachment and sale of the property—*Basivi Reddi v. Ramayya*, 40 Mad. 733 (F B), 36 I.C. 445. Where there has been an appeal against an order passed on the claim petition, time runs from the date of the order passed on appeal. The word 'order' should be construed as meaning the only subsisting order in the case, which is the appellate order when there has been an appeal—*Venugopal v. Venkatasubbiah*, 39 Mad. 1196.

A suit in respect of an adverse order passed under O 21, r. 63 against a minor must be brought within one year after attaining majority. If however, the guardian files a suit within one year of the order, and that suit is dismissed, it cannot extend the period of limitation for a suit by the minor—*Subbia v. Arunachala*, 80 I.C. 992, A.I.R. 1925 Mad. 379.

Effect of bar of limitation :—If the unsuccessful party in the claim proceedings does not bring a suit within one year as prescribed by this Article, he cannot assert his right *even as a defendant* after the expiration of the year—*Badri Prasad v. Muhammad Yusuf*, 1 All. 381 (387) (F.B.); *Nilo Pandurang v. Rama*, 9 Bom 35 (39); *Velayuthan v. Lakshmana*, 8 Mad 506; *Nemagauda v. Paresha*, 22 Bom. 640 (644).

11A.—By a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for the possession of immoveable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property thereof to the decreeholder

One year. The date of the order.

or purchaser, to establish the right which he claims to the present possession of the property comprised in the order.

In the Act of 1877, this Article was included in Article 11; in the present Act, it has been separated from that Article and framed more elaborately. See the old Article cited under Article 11 *ante*.

279. Application of Article—It has been held by the Patna High Court that the language of Article 11A is more comprehensive than that of old Article 11, that this Article is sufficiently wide to cover cases in which the order is passed *without investigation*, and there is no justification for restricting the operation of this Article only to those cases where investigation has taken place. Therefore, where an application under O XXI, rule 100 has been dismissed (without investigation) on account of the applicant's failure to adduce evidence on the date of hearing, a suit for declaration of title falls under this Article—*Sayid Raziuddin v. Bindeshri Prasad*, 5 P.L.J. 652 (655), 58 I.C. 37.

But the Calcutta High Court is of opinion that although Article 11A of the Limitation Act does not refer to any section or rule of the Civil Procedure Code and is general in its terms, still the order referred to in this Article must be an order under Order 21, rule 103 of the C. P. Code. That rule expressly refers to rules 98, 99 and 101, and these rules provide for *investigation* into a petition of objection. The right of suit is given by rule 103 only when there is any order under rules 98, 99 and 101, and Article 11A provides for limitation applicable to such suits. Article 11A therefore does not apply where the petition of objection had been dismissed for *default of appearance*, without any investigation, for an order of dismissal of such petition without investigation is not contemplated by rules 98, 99 and 101 of the O. 21 of the Code—*Nirode Barani v. Monindra*, 26 C.W.N. 853 (856), 35 C.L.J. 537, A.I.R. 1922 Cal 229, 68 I.C. 524. In this case the Judges further pointed out (at pp 856, 857) that although the language of O 21, rule 63 of the Code of 1908 has been altered from that of sec 283 of the Code of 1882, the language of secs 332 and 335 of the old Code has been retained in O 21, rule 103 of the Code of 1908, and therefore although Article 11 governs a case in which the claim petition had been dismissed for default of appearance (45 Cal 785), Article 11A cannot apply where the petition of objection made under rule 100 had been dismissed for default of appearance. See also *Sarat v. Tarini*, 34 Cal. 491 and *Kunj Behary v. Kandh Prasad*, 6 C.L.J. 362 (both decided under the old Act) in which it was similarly held that this Article did not apply to a suit brought by the unsuccessful applicant whose application for possession had been dismissed for default of appearance. See also *Meerudin v. Rahisa Bibi*, 27 Mad. 25 (under the old Act) where this Article has been

held to be inapplicable where the Court has *refused to investigate* the matter of resistance.

It has been held in another Calcutta case (under the old Act) that where the decree-holder gets possession under the decree and is then dispossessed by reason of an order under sec. 332 C. P. Code, a subsequent suit by him for recovery of possession is governed by Article 142 and not by this Article as it contemplates only an order passed under sec. 335 C. P. Code—*Maindi v. Gora Chand*, 16 C.W.N. 971, 14 I.C. 92.

The suit contemplated by O 21, r. 103 is not confined to a suit for possession of the property. It is a suit to *establish a right* which the plaintiff claims to the present possession of the property. And this right may be established either on account of his right to possession or on account of his *title*. And so, even if the suit contemplated by r. 103 is brought on the strength of *title*, it must be brought within one year under this Article—*Lakshman v. Dattatraya*, 53 Bom. 668, 31 Bom. L.R. 765, A.I.R. 1929 Bom. 379 (380, 381), 120 I.C. 362. Where a purchaser at an auction sale instituted proceedings under O. 21, r. 103 C. P. Code, against the defendant who resisted to his taking possession of the property, and the proceedings were dismissed on the ground that the property, belonged to the defendant, a subsequent suit to *establish the title* must be brought within one year under this Article—*Bai Jamna v. Bai Ichha*, 10 Bom. 604. Under similar circumstances a suit to *recover possession* must also be brought within a year after the order—*Ganpat Rai v. Husaini*, 19 A.L.J. 53, 60 I.C. 905.

A purchaser of a coparcener's share at a Court sale, having been obstructed, applied for removal of the obstruction and for possession and his application was rejected. More than a year after the order of rejection, he filed a suit praying that the order in the miscellaneous proceedings might be set aside and that a *partition* might be directed, and that the whole of the plot of land which he purchased might be allotted to the share of his judgment-debtor and that he might be placed in present possession of it. *Held* that the suit though in name a suit for partition was in substance a suit for *possession* of that very property under the self same right put forward without avail in the miscellaneous proceedings, and so it was a suit to establish his right to the same property covered by the order, and having been brought more than a year after the date of the order in the miscellaneous proceedings, which he asked to have set aside, it was barred—*Bhimappa v. Irappa*, 26 Bom. 146. But the Madras High Court holds, under similar circumstances, that the suit for partition is not barred by the one year's rule of Article 11A, because the claim for partition asked for in the suit is *different* from the claim for declaration of his title to actual possession which was asked for in the miscellaneous proceedings. The plaintiff in the present suit is exercising the equitable right of the coparcener whose share he has purchased to demand a partition at any time. The Bombay case was distinguished on the ground that in Bombay even before partition the purchaser of the interest of one coparcener is a tenant-in-common with

the others, but in Madras the purchaser is not a tenant-in-common but has only an equity to enforce his rights by partition—*Shanmugan v. Panchali*, 49 Mad. 596, 50 M.L.J. 681, A.I.R. 1926 Mad. 683, 95 I.C. 209. Where the basis of the claim in the suit is the same as that put forward in the miscellaneous possession proceedings, Article 11A would apply; but where the basis of the claim in the suit is *distinct* and different, and the possession claimed is not present possession but only by way of consequential relief to the decree being set aside, the Article cannot apply. Thus, R and F had a dispute about a house and the matter was referred to an arbitrator. He decided that R should pay Rs. 200 and retain possession of the house. The compromise decree was passed in December 1920. R. paid the money in Court, but in seeking to obtain possession, was obstructed by F. On proceedings being taken, the obstruction was removed in October 1921. F thereupon filed a suit for a declaration in 1923, that the award and the decree had been vitiated by fraud. *Held* that the suit did not fall under Art. 11A because what is sought to be set aside is the original decree of 1920, and not the order in the possession-proceedings—*Rukhmabai v. Fakirsa*, 51 Bom. 158, 101 I.C. 40, A.I.R. 1927 Bom 184.

If an execution-purchaser asks to be put in actual possession when he is not entitled to such possession, and his application is dismissed under O. XXI, r. 99, C. P. Code, a suit for actual possession must be brought within one year under this Article—*Baldeo v. Kanhaiya Lal*, 16 N.L.R. 103 (P.C.), 24 C.W.N. 1001, 58 I.C. 21.

This Article applies only to a suit to *recover present possession*. If an objection under section 335 C. P. Code, preferred by a mortgagee of the property sold in execution is rejected, a suit by the objector to *enforce his mortgage lien* over the property does not fall under this Article but under Article 132. Such a suit is not a suit to establish the plaintiff's right to the property, but only to recover a debt which is owing to him and as security for which he has got a charge upon the property—*Bhiku v. Shujat Ali*, 29 Cal 25 (29). This Article applies to a suit by a person who has been *disturbed in his possession* by reason of the auction purchaser taking possession of the property. If his possession has not been disturbed, and the auction purchaser has obtained only a symbolical possession of the property, he is not required to make an application under O. XXI rule 100 asking for possession of the property (when as a matter of fact he remains in possession thereof) and on the dismissal of the application, to bring a suit under this Article—*Atormoni v. Ramananda*, 50 Cal 311, A.I.R. 1923 Cal. 601, 84 I.C. 876. This Article applies where the plaintiff had been dispossessed *in the course of the delivery* of possession to the decree-holder or auction-purchaser. The terms of this Article go to show that it applies only to cases where a person who has been actually dispossessed of the property and who made an application under O. 21, r. 100 and whose application has been dismissed, then brings a suit. Where the plaintiff was actually dispossessed *long after* the date of the order dismissing his application under O. 21, r. 100, limitation for a suit to establish his title

and recover possession is that provided under Art. 142 and not Art. 11A—*Satyanarain v. Jinsi*, 10 P.L.T. 872, 117 I.C. 634, A.I.R. 1929 Pat. 553 (554, 555). The plaintiffs having purchased certain property in execution of a decree, the defendant applied under O. XXI, rule 100 that the property belonged to him, and objected to the plaintiff's taking possession. This application was dismissed for default on two different occasions and was ultimately allowed on the 5th August 1916. In 1920, the plaintiffs brought a suit for possession of the property and urged that as the order of 5th August 1916, allowing the plaintiffs' application after it had been previously dismissed for default was without jurisdiction and a nullity, they could disregard that order and bring a suit for possession within 12 years. *Held*, overruling the contention, that O IX rule 4, which provides for restoration of suits dismissed for default of appearance, was applicable to a proceeding under O. XXI rule 100 and the order restoring and allowing for default was not a nullity and could not be ignored and that therefore the present suit fell under this Article and was barred—*Sheonandan v. Debi Lal*, 2 Pat. 372, 4 P.L.T. 93, 71 I.C. 484, A.I.R. 1923 Pat 239.

The words 'resistance or obstruction' in this Article imply that it applies to those cases where an order has been passed (under o 21, rr. 98, 99 and 101) on an application made by the decree-holder or purchaser under rule 97, and not where an order has been passed on an application made under rule 95. In an application by the purchaser under rule 95 for delivery of possession of property, there can be no allegation and complaint of obstruction or resistance, and if he is prejudiced by an order passed under rule 95, his suit for possession does not fall under Article 11A, and is not governed by the one year's rule of limitation—*Sobha Ram v. Turshi Ram*, 46 All. 693, 22 A.L.J. 626, A.I.R. 1924 All. 495, 83 I.C. 923. The suit contemplated by O. 21, r. 103 is a suit by a person who is kept out of possession of the property purchased in execution of the decree and claims possession *under his auction purchase*. The plaintiff in execution of a rent decree against his tenants, purchased and took possession of the holding in suit. Meanwhile the tenants had sold away their holding to the defendants, who made an application under O. 21 r. 100 for restoration of possession. In 1917, an order was passed in their favour under O. 21, r. 101. The plaintiff instituted the present suit in 1920 for ejectment of the defendants on the ground that the tenants had parted with the holding wrongfully. *Held* that the present suit was not one under O. 21, rule 103, because it was brought by the plaintiff not in his character as auction purchaser but as *landlord*. The present suit is totally unconnected with the possession proceedings and does not fall under Article 11A—*Ambika Charan v. Ram Prasad*, 30 C.W.N. 163, 42 C.L.J. 578, A.I.R. 1926 Cal. 377.

Before this Article can be invoked, it must be shown that there was a *decree* for possession of immoveable property, or that immoveable property was sold in execution of a decree. A decree, as defined in sec. 2 (2) C. P. Code, presupposes a suit. A proceeding taken under Ch. VII of the Presidency S.C.C. Act cannot be said to be a *suit*, and

the decision of the Court therein is not a *decree*. Consequently Article 11A does not apply to a suit for recovery of possession of moveable property after proceedings under ch VII of the Pres. S. C. C. Act have failed—*Hyder Ali v. Amiruddin*, 56 M.L.J. 199, A.I.R. 1929 Mad. 69 (70), 115 I.C. 504.

280. Parties :—The suit contemplated by this Article is a suit instituted only against the person *in whose favour the order was made*. Therefore, where a suit was filed in time against the party in whose favour the order was made, the mere fact that other persons were added as defendants after the period of limitation on the representation of the defendant that he was only a benamidar for those persons, would not make the suit liable to be dismissed as barred by limitation—*Aiyyam v. Poongavanam*, 18 M.L.J. 464. Similarly, where the suit was brought in time by the person against whom an order under sec. 335 was made, and at the hearing it was found that he was only a benamidar, and the second plaintiff was brought on the record as the real owner after the expiry of the period of limitation, it was held that the suit was not barred, and that the first plaintiff, though a benamidar, was entitled to sue as the person against whom the order under sec. 335 was made—*Venkatachala v. Subramania*, 1910 M.W.N. 633, 8 I.C. 264.

The words "any person against whom an order has been made" include the *decree-holder* (either in his capacity as decree-holder for khas possession or as purchaser in execution of his own decree)—*Bhikhari v. Abdulla*, 44 All. 607, 20 A.L.J. 578, 68 I.C. 241; *Ganpat Rai v. Husaini Begum*, 19 A.L.J. 53, 60 I.C. 905, A.I.R. 1921 All 92.

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| <p>12.—To set aside any of the following sales :—</p> <p>(a) sale in execution of a decree of a Civil Court ;</p> <p>(b) sale in pursuance of a decree or order of a Collector or other officer of revenue ;</p> <p>(c) sale for arrears of Government revenue, or for any demand recoverable as such arrears ;</p> | <p>One When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.</p> |
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governed by Art. 12 but by Art. 144—*Jwala v. Masiat*, 26 All. 346 (353); *Narasimha v. Ramasami*, 18 Mad. 478; *Natha v. Badri*, 5 All. 614; *Kadar Hussain v. Hussain Sahib*, 20 Mad. 118 F.B. (overruling *Suryanna v. Durji*, 7 Mad. 258); *Sarfuddin v. Hansraj*, 15 P.R. 1912, 11 J.C. 76, 203 P.L.R. 1911. Where the plaintiff had been a minor at the time of the sale, and had not been properly represented in the proceedings in which the sale was held, a suit by the plaintiff after attaining majority to set aside the sale and to recover the property does not fall under this Article—*Vishnu v. Ram Chandra*, 11 Bom. 130, *Daji v. Dhirajram*, 12 Bom. 18; *Payidanna v. Lakshminarasamma*, 38 Mad. 1076. See also *Rashidunnisa v. Muhammad Ismail*, 31 All. 572 (P.C.). Where a suit was brought to recover money from the defendant who was the *karnavan* of a *tarwad*, but it was not alleged in the plaint that the defendant was sued as *karnavan* or that the debt was a *tarwad* debt, a sale of the *tarwad* property in execution of the decree was not binding on the members of the *tarwad*, and this Article does not apply to a suit brought by them to recover the land sold in execution of the decree—*Haji v. Atharaman*, 7 Mad. 512.

A sale held under sec. 118 of the Madras Estates Land Act is not held in pursuance of an order or a decree of the collector or other officer of revenue within the meaning of clause (b) of Article 12, and consequently this Article cannot apply to a suit to set aside such a sale—*Venkatasubbayya v. Narayan*, 1927 M.W.N. 174, *Subbayya v. Kristayya*, 52 M.L.J. 390, 100 I.C. 1007, A.I.R. 1927 Mad. 488.

Voidable sale.—As observed before, this Article will apply to cases in which a sale would be binding on the plaintiff if not set aside, i.e., where the sale is merely *voidable* and not *void ab initio*. Thus, it applies to a suit to set aside a sale on the ground that the decreeholder purchased the property without the permission of the Court, such sale being voidable only and not void—*Chinnakannu Padayachi v. Paramasiva*, 101 I.C. 89, A.I.R. 1927 Mad. 1135, or to a suit to set aside a sale, when there was a defect in the sale notification—*Bajinath v. Moharaja*, 6 C.L.J. 163; or where the sale took place within 30 days from the sale proclamation—*Tasadduk v. Ahmed*, 21 Cal. 66 (P.C.); *Kokil v. Edal*, 31 Cal. 385; or where the plaintiff's lands were sold by the Revenue Court for arrears of assessment whereas in fact the lands were exempt from payment of assessment—*Mahadev v. Sadashiv*, 45 Bom. 45, 22 Bom. L.R. 1082, 59 I.C. 118. If a Court erroneously holds that an application for execution is not barred and orders a sale, such order though erroneous and liable to be set aside is not a nullity, but remains in full force until set aside, and a sale held thereunder would be valid till set aside. A suit to annul such a sale falls under this Article—*Mahomed Hossein v. Parundur*, 11 Cal. 287 (292). Where a decree was passed against the judgment-debtor, and after his death an application for execution was made against his estate and against a person as heir who was in fact not the heir, but the Court erroneously decided that he was the heir, and the property was sold without notice to the proper heirs, held that though the execution proceeded against a wrong person, still since it was made 'against the estate' of the

deceased judgment-debtor, and since the Court decided, though wrongly that the person proceeded against was the real heir, the sale was not a nullity, and could not be treated as invalid, notwithstanding this material irregularity. Therefore, the sale was merely voidable and a suit to set aside the sale falls under this Article—*Malkarjun, v. Narhari*, 25 Bom. 337 (P.C.). A suit brought by the son to set aside a sale of his share which has been sold in Court-auction in execution of a decree against his father, falls under this Article. The sale is not void but voidable only, and if the son does not challenge it by a suit, the auction-purchaser would get a good title to the extent of the son's share purchased by him—*Narayana v. Venkataswami*, 51 M.L.J. 845, A.I.R. 1926 Mad 1190, 98 I.C. 31. If a decree-holder having been refused permission by the Court to bid for or purchase the property to be sold under his decree, nevertheless purchases it through a *benamidar*, its effect is to render the sale voidable and not void. Consequently, a suit to set aside the sale must be brought within one year under this Article—*Rai Radha Krishna v. Bisheshar*, 1 Pat 733 (P.C.), 3 P.L.T. 529, 67 I.C. 914. Where a house not included in the mortgage was sold by mistake in execution of a decree on the mortgage, the sale is not an absolute nullity but voidable only; therefore a suit to set aside the sale falls under this Article—*Nagabhatta v. Nagappa*, 48 Bom. 914, 24 Bom L.R. 423, 67 I.C. 857, A.I.R. 1923 Bom. 62. Where, notwithstanding the attainment of majority—*pendente lite* by the minor defendant, the suit was continued as if he was still a minor, and a decree was passed against him and his property was sold in execution, it was held that neither the decree nor the sale was a nullity, and a suit to set aside the sale was governed by this Article—*Seshagiri v. Hanumantha Rao*, 39 Mad 1031. Where in a certificate issued under the Public Demands Recovery Act, the blank spaces in the form were not filled up, although it contained all the necessary information as to the specific sum due and the particulars thereof, and the notice issued under sec 7 of that Act bore only the lithographic signature of the certificate officer, held that the certificate could not be held to be *invalid* or void, and a suit to set aside the sale under that Act is governed by Article 12—*Hara Prasad v. Gopal Chandra*, 31 C.W.N. 299 (301, 304), 100 I.C. 997, A.I.R. 1927 Cal 315.

282. Suit for declaration, possession or other relief :—The one year's limitation prescribed by this Article is not confined only to suits brought to set aside a sale, but applies also to suits where other relief (e.g. declaration, possession) is sought which can only be granted on annulment of the sale. A sale, if it is a reality at all, and not a nullity, can be legally and literally set aside, and anybody who desires any relief which is inconsistent with it may and should pray to set it aside; and even when there is no such prayer, the suit will be governed by Art. 12, if the object is to obtain a relief which is inconsistent with the validity of the sale—*Malkarjun v. Narhari*, 25 Bom 337 (350, 352) (P.C.). Where the sale is operative as against plaintiff though liable to be set aside for want of jurisdiction or other just cause, the suit to set aside the sale must be brought within one year, even though it is framed as a suit for possession—*Baldeo Das v. Lal Nilmoni*, 8 Pat. 122, A.I.R. 1928 Pat 615 (618), 113

I.C. 681, following 25 Bom. 337 (P.C.). If a suit is not expressly brought for setting aside a sale, but if it is of such a nature that it cannot succeed without the sale being set aside, it will be governed by this Article, e.g., a suit by an auction purchaser for refund of the purchase money—*Mohamed v. Novroji*, 10 Bom. 214 (217). A suit for possession of property sold in execution of a valid decree is governed by this Article because the plaintiff cannot ignore the decree but must get it set aside before he can recover possession—*Imam Din v. Puran Chand*, 1 Lah. 27, 84 P.L.R. 1920, 55 I.C. 833; *Parshadi v. Mohammad Zainulabdin*, 5 All. 573. A property was sold by auction in execution of a decree; but before confirmation of sale the judgment-debtor sold the property to another (the plaintiff) who paid the decree-money and got the sale set aside. In appeal the sale was confirmed and the auction-purchaser obtained possession. Thereafter the plaintiff sued the auction-purchaser for possession of the property. It was held that this Article governed the suit because he must first get the sale set aside—*Nagina Singh v. Puran*, 11 P.R. 1906, 4 P.L.R. 1906. Where a plaintiff's land having been sold by the revenue authorities for default of payment of assessment due thereon, he instituted a suit for possession, held that the sale being in pursuance of an order of a Revenue Officer, the plaintiff was bound by that sale unless and until it was reversed. His suit for possession was governed by this Article, since he could not get possession without setting aside the sale—*Bajaji v. Pirchand*, 13 Bom 221. A decree was obtained upon a mortgage against a Mitakshara father (mortgagor) but his sons were not made parties in the suit. The mortgaged property was purchased by the mortgagee who obtained possession in 1900. In 1911, the mortgagor's sons sued for accounts and for redemption. It was held that as the suit for redemption was not maintainable without first getting a declaration that the sale should be set aside, and the limitation for the latter suit was one year under this article, the present suit was barred—*Bhola v. Lala Kali Prasad*, 1 P.L.J. 180, 34 I.C. 288, following *Ram Taran v. Rameswar*, 11 C.W.N. 1078. Where a mortgagee purchases the mortgaged property at an execution sale held under a money decree of a third person, and the sale is liable to be set aside for some irregularity, a suit for redemption of the mortgage is not maintainable before getting the sale cancelled by a suit under this Article—*Malkarjun v. Narhari*, 25 Bom. 337 (P.C.). Where the plaintiff's interest in a certain land has been sold under the Madras Rent Recovery Act, a suit for possession of the same cannot succeed without setting aside the sale, and would therefore fall within this Article—*Ragavendra v. Karuppa*, 20 Mad. 33.

283. "When the sale is confirmed" :—If the sale is not confirmed, this Article does not apply—*Narasimha v. Ramasami*, 18 Mad. 478 (479).

An execution sale is confirmed when the Court makes an order under O. 21, r. 92; the language of r. 92 is clear on this point. Even if an appeal is preferred against the order of confirmation, the time nevertheless runs from the date of confirmation and not from the date of dismissal

of the appeal—*Mahomed Hossein v. Purundar*, 11 Cal. 287 (292); *Prosunno v. Kali Das*, 19 Cal. 683 (686). But the law is otherwise in the case of revenue-sales. Thus, where the Board of Revenue discharged an order of the Commissioner dated January 1884, which had confirmed a sale by the Collector held in 1882, but afterwards in 1886, reversed its own order and revived that of the Commissioner, it was held that the confirmation of sale dated only from 1886, and that a suit to set aside the sale brought within one year from that date was not barred—*Bajinath v. Ramgut*, 23 Cal. 775 (P.C.). Where subsequent to the confirmation of a sale held under the Public Demands Recovery Act an application was made to the certificate-officer to set aside the sale, and it succeeded and the sale was set aside, and thereupon an appeal was taken to the Collector who reversed the above order and restored the sale, held that the period of limitation for a suit to set aside the sale ran from the date of the Collector's order in appeal, because the suit could be brought only after the sale was confirmed by the Appellate Court, and no suit to set aside the sale could have been brought between the date of the order of the certificate officer and the date of the order of the Collector—*Hara Prasad v. Gopal Chandra*, 31 C.W.N. 299 (305), 100 I.C. 997, A.I.R. 1927 Cal. 315. A sale having been effected by order of a Deputy Collector, an appeal was made to the Collector who set aside the sale. The Commissioner, however, set aside the order of the Collector. Held that the sale did not become final and conclusive before the date of the Commissioner's order—*Pran Nath v. Troylucko*, 14 W.R. 284.

Under this Article, time begins to run from the date of the confirmation only in those cases in which such confirmation is required by the law under which the sale is held, and in other cases from the date on which the sale becomes otherwise final and conclusive by the law under which it is held. Thus, a sale held under the Bengal Patni Taluq Regulation (VIII of 1819) does not require confirmation, it becomes final and conclusive on payment of the full amount of purchase-money. Therefore time runs from the date of the payment of the purchase-money and not from the date of a superfluous order of confirmation, nor from the date of the issue of a certificate of payment—*Bhuban v. Girish*, 13 C.L.J. 339, 10 I.C. 87. In the Madras Estate Land Act, there is no provision for the confirmation of a sale held under that Act; consequently the period of limitation is to be counted from the date when the sale would otherwise have become final and conclusive. A sale under the Madras Estate Land Act becomes final 30 days after the date of sale, in the absence of any application made under sec. 131 of that Act to set aside the sale—*Kamulammal v. Chokkalingam*, 45 M.L.J. 840, A.I.R. 1925 Mad. 278, 76 I.C. 840.

284. Effect of bar of limitation:—Though the right of a person to set aside the sale of a property (which is still in his possession) may be time-barred under this Article, still there is nothing to prevent him from setting up the invalidity of the sale as a defence to a suit brought by the plaintiff to recover possession of the Property from him—*Venkatachalapathi v. Robert Fischer*, 30 Mad. 444; *Mahadev v. Sada-*

shiv, 45 Bom. 45 (50), 22 Bom.L.R. 1082, 59 I.C. 118. The Calcutta High Court, however, holds that such defence is not available—*Ramsona v. Nabokumar*, 16 C.W.N. 805, 13 C.L.J. 404, 10 I.C. 90.

13.—To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit. One . The date of the final decision or order in the case by a Court competent to determine it finally.

285. Application of Article :—This Article does not apply where the suit does not pray, and the plaintiff need not pray for any relief by way of altering or setting aside a decision or order. But a suit which is virtually and substantially a suit to set aside a summary decision or order (a decision or order in a miscellaneous proceeding) is governed by this Article, even if the plaint does not in terms seek to set aside such decision or order. The test is, whether the summary decision or order could be set up as a bar or impediment to the maintenance of the suit. If it could, then it must be said that the suit is brought in reality, though not in words, to set aside the summary decision or order—*Durgaram v. Nundocoomar*, 1 Shome, 26, cited in U. N. Mitra's Limitation, 5th Ed., p. 894. A suit for a declaration that the appointment, by the District Judge, of the defendant as a member of a Temple Committee is invalid, and for an injunction against his acting as such member, is in reality a suit to have the order of appointment set aside, and such a suit is governed by this Article and should be brought within one year from the date of the order sought to be impeached—*Subramania v. Minakshi*, 3 M.L.J. 128. Where the suit is framed as one for possession, but the plaintiff cannot get a decree for possession without first having the order set aside, the suit is really a suit to cancel the order and is governed by this Article—*Kishori Lal v. Kuber*, 33 All 93, 7 A.L.J. 937, 7 I.C. 503. But if a Court passes an order releasing certain properties from attachment before judgment, a suit by the plaintiff for a declaration that the properties are liable to attachment is not governed by this Article, because it is not necessary for the plaintiff to set aside the order before he can sue for the declaration prayed for—*Ramanamma v. Kamaraju*, 41 Mad. 23, 39 I.C. 863. If the order is passed by a Court which is not competent to pass it, it is a nullity, and the plaintiff need not bring a suit under this Article for cancelment of the order, but may sue for a substantial relief—*Ram Kishan v. Bhawan Das*, 1 All. 333 (F.B.)

Where the order of the Court had already ceased to have any binding effect, no suit is necessary to be brought under this Article to set aside the order. Thus, during the course of an execution proceeding the Court decided that the attached property belonged to the defendant, that it was attachable in execution of a money-decree against the defendant, and that the claimant had no title to the property as his purchase of the property was invalid. Then the claimant deposited the decretal amount

in Court and the property was released from attachment. Thereafter he instituted a suit for a declaration of his title to the property based on the ground that his purchase was valid and not void. *Held* that the suit did not fall under this Article; the decision of the Court ceased to have any valid and binding effect when the attachment was set aside by payment into Court of the decretal amount by the plaintiff; therefore it is quite unnecessary for him to have that order set aside, and the suit for a declaration is not barred by this Article—*Lal Shaha v. Kado Mahto*, 6 P.L.J. 85 (F.B.), A.I.R. 1921 Pat. 1, 60 I C 849, 2 P.L.T. 345.

A suit to set aside a sale of ancestral property, made by the plaintiff's guardians after taking the sanction of the District Judge, and for recovery of plaintiff's share therein, is not a suit to set aside an order of a Civil Court, under Art. 13 (because the sanction of the Judge is not an order), but is governed by Art 144—*Sikher v. Dulputty*, 5 Cal. 363. A suit not to set aside an order but for an injunction restraining the defendant from enforcing the order, on the ground of error and illegality in the proceedings, is not governed by this Article—*Dhurondhar v. Agra Bank*, 5 Cal. 86.

A certificate of heirship only confers the right of management of the property and does not determine the title to the property; therefore if the person to whom such a certificate has been refused seeks to recover the property on the basis of his title, he need not bring a suit under this Article to set aside the order granting the certificate to the defendant, but he may sue the holder of the certificate for the possession of the property, and the suit will be governed by the rule of limitation respecting the possession of property—*Bai Kashi v. Bai Jamma*, 10 Bom. 449. If the party who fails to get a succession certificate seeks to set aside the order granting the certificate to the defendant, he must bring his suit within one year from the date of that order. But if he does not care to disturb that order, a suit to obtain possession of the property of the deceased upon proof of his title need not be brought within one year from the date of the order—*Kalee Prosunno v. Koylash Monee*, 8 W.R. 126. The same remarks apply also to orders passed under Act XIX of 1841. If a party seeks to set aside a summary order passed by a Civil Court under Act XIX of 1841, he must bring his suit within a year from the date of the Judge's order, but if he prefers to leave that order alone, he is not debarred from bringing a suit for possession upon proof of his title within the period prescribed for the institution of suits for immoveable property viz 12 years—*Momeedunnissa v. Mahomed Ali*, 1 W.R. 40, *Lokenarain v. Rani Moyna Koer*, 7 W.R. 199 (F.B.).

A receiver appointed by the Court under the provisions of the Provincial Insolvency Act is not a Court, he is merely an officer of the Court; consequently this Article does not apply to a suit to set aside the Receiver's order—*Basodi v. Lala Muhammed*, 13 N L R. 210, 42 I.C. 799.

An order passed under ch. VII of the Presidency S C C. Act cannot be regarded as a decision or order on the question of title. In a subsequent suit against any order under that chapter, there is no necessity

to set aside or alter any such decision or order; consequently this Article has no application. The Article may be Art. 120 or 144—*Hyder Ali v. Amirudin*, 56 M.L.J. 199, A.I.R. 1929 Mad. 69 (72), 115 I.C. 504.

286. Proceeding other than a suit:—All proceedings in execution are *proceedings in suit*, this Article is therefore inapplicable to a suit to set aside an order passed in such proceedings—*Ayyasami v. Samiya*, 8 Mad. 82; *Sital v. Mohan*, 3 O.C. 84; *Official Receiver v. Veeraraghavan*, 45 Mad. 70 (76) (dissenting from *Kishori Lal v. Kuber Singh*, 33 All. 93 where an execution proceeding was held to be a proceeding other than a suit). Orders passed in miscellaneous applications in the course of execution proceedings are not governed by Article 13. This Article relates to orders passed in disputes which did not begin with the filing of plaint in a suit, such as disputes initiated by applications under the Guardians and Wards Act, the Succession Certificate Act, and so on, such applications and the proceedings connected with such applications being not proceedings in suit—*Shankur v. Majo Mal*, 23 All 313 (P.C.) A suit by the plaintiff to recover the sale-proceeds paid to the defendant under an order of the Court passed under section 295, C. P. Code, 1882 (section 73, C P Code 1908), is not governed by this Article, because the order for distribution is an order in the suit itself and therefore a proceeding in a suit—*Shankur v. Mejomal*, 23 All. 313 (P.C.); *Vishnu v. Achut*, 15 Bom 438 (dissenting from *Gauri v. Ram Ratan*, 13 Cal. 159); *Sivarama v. Subramaniya*, 9 Mad. 57, *Sohan Lal v. Baldeo*, 65 P.R. 1895

287. Final decision of a competent Court:—"Order by a Court competent to determine it finally" means the final decision of a Court which has competent jurisdiction to decide the case finally, and does not include the order of an Appellate Court rejecting an appeal on the ground of want of jurisdiction—*Oleounissa v. Buldeo*, 7 W.R. 151.

14.—To set aside any One The date of the act or
act or order of an year. order.
officer of Govern-
ment in his official
capacity, not here-
in otherwise ex-
pressly provided
for.

288. Void act or order:—This Article does not apply to a case where the order of the officer is null and void. This Article refers to acts or orders done in the exercise of powers legally exercisable by the executive; in other words, the Article applies to those acts or orders which require to be set aside. It has no application where jurisdiction has been usurped, and the order is *ultra vires*. An order made without jurisdiction is a nullity and need not be set aside; to an order of this description Article 14 has no application—*Peary Lal v. Secretary of State*,

39 C.L.J. 454, A.I.R. 1924 Cal. 913, 83 I.C. 446; *Laxmanrao v. Shrininas*, 51 Bom. 830 (P.C.), A.I.R. 1927 P.C. 217 (223); *Shivaji v. Collector*, 11 Bom. 429; *Dhanji v. Secretary of State*, 45 Bom. 920; *Rasulkhan v. Secretary of State*, 39 Bom. 494, 29 I.C. 490; *Balvant v. Secretary of State*, 29 Bom. 480 (489); *Malkajappa v. Secretary of State*, 36 Bom. 325; *Secretary of State v. Gulam Mahabub*, 42 Mad. 673; *Ananda Kishore v. Daiji Thakurain*, 36 Cal. 726; *Maqbul v. Hara Govinda*, 8 C.L.J. 470; *Birbar Narayan v. Secretary of State*, 14 C.L.J. 151, 11 I.C. 899; *Wasif Ali Mirza v. Saradindu*, 29 C.W.N. 839, A.I.R. 1925 Cal. 953, 89 I.C. 193. Therefore where a Collector, who can, under sec. 48 of Bengal Act VI of 1870, only settle *Chaukidari Chakran* lands with the Zemindar within whose estate the lands lie, ordered the lands to be settled with the defendant who was the Zemindar of adjacent lands, and the plaintiff who was the proprietor of the estate in which the lands lay brought a suit for possession, it was held that this Article did not apply as the order was an absolute nullity and need not be set aside—*Bijoy Chand v. Krishto Mohini*, 21 Cal. 626. The power of a criminal Court with regard to property dealt with under section 524 of the Criminal Procedure Code is limited to making arrangements for the custody and protection of the property. That section does not empower the Government to confiscate the property. Such an order of confiscation being illegal and without jurisdiction, the plaintiff's suit for recovery of possession is not barred by reason of his omission to institute a suit under this Article within one year of the order for the purpose of setting it aside—*Secretary of State v. Lown Karan*, 5 P.L.J. 321, 56 I.C. 507, 1 P.L.T. 451.

Where a person who was entitled to the possession of a village, in pursuance of an order of the Collector, was put into possession of a wrong village, by reason of a mistake having been made as to the village mentioned in the order, the act done under a mistake of fact was a nullity, and a suit by the plaintiff for possession of the right village was not governed by this Article—*Maharaja of Vujanagram v. Satrucherla*, 30 Mad. 280. Where land belonging to the plaintiff was entered as Government waste land in the Revenue Survey Register by order of the Revenue Commissioner who afterwards gave the land to the defendant, purporting to act under sec. 37 Bombay Land Revenue Code, a suit by the plaintiff to recover possession was not governed by this Article, as the order was *ultra vires* (because sec. 37 does not give power to dispose of lands of private individuals) and the plaintiff was not bound to set it aside—*Surannanna v. Secretary of State*, 24 Bom. 435. Where a Collector passes an order under section 37 of the Bombay Land Revenue Code with reference to land which is *prima facie* the property of a private individual, and not of the Government, the order is a nullity, because sec. 37 of the Land Revenue Code does not give power to deal with the lands of private individuals. The Collector is acting *ultra vires* and there is no occasion for this Article to apply—*Malkajappa v. Secretary of State*, 36 Bom. 325, 15 I.C. 517. Where the relief sought is primarily a declaration that the plaintiffs are entitled to succeed a deceased Hindu female owner as her next reversioners, and where for such a declaration

the setting aside of the order of a Sub-Divisional officer would not be necessary, Article 14 has no application, even though the plaint may contain a prayer for the setting aside of the order of the Sub-Divisional officer—*Haro Mandal v. Dhiranath*, 7 P.L.T. 67, A.I.R. 1925 Pat. 784, 90 I.C. 691. Where the notice required under sec. 10 of Bengal Act VII of 1880 (Public Demands Recovery Act) was not served, and in execution of the certificate the judgment-debtor's property was sold, it was held that the whole of the proceedings which resulted in the sale was invalid and that a suit to set aside such a sale did not come under this Article but was governed by Art 120—*Saroda v. Kisto*, 1 C.W.N. 516. A Collector in a partition proceeding under the Bengal Estates Partition Act (VIII of 1876) can only adopt one of two courses, if an objection is taken that a certain plot of land does not appertain to the estate under partition; he may either strike off the partition, or proceed with it treating the disputed land as part of the estate. So, where a Collector merely passed an order excluding the disputed lands from the partition, the order of the Collector was *ultra vires*, and therefore a nullity, and a suit brought by the plaintiff for a declaration of his right to those lands was not subject to the limitation under Art 14—*Alimuddin v. Ishan*, 33 Cal 693. Where a Collector purporting to act under the Bengal Estates Partition Act (V of 1897) passed an order refusing to put a party to a partition in possession of the land allotted to him, held that the order was one for which there was no provision of the law, and consequently Article 14 did not apply to a suit to set aside the order and recover the land—*Wasif Ali Mirza v. Saradindu*, 29 C.W.N. 839, A.I.R. 1925 Cal. 953. A temporary alienation of a portion of the inam lands by a trustee, although it is beyond the power of the trustee, does not amount to a violation of the conditions of the grant, and does not justify an order of resumption of the grant by the Government. Such an order of resumption is a nullity and does not require to be set aside under this Article, and a suit by the trustee for a declaration that the resumption is invalid and for recovery of possession of the inam property from the Government would be governed by Art. 144—*Secretary of State v. Gulam Mahabub*, 42 Mad. 673, 51 I.C. 366. Where the order of the Collector, not being referable to any statutory provision or any rule which has the force of law, is *ultra vires*, the plaintiff need not bring a suit for setting aside the Collector's order, but may sue for a declaration or other relief, and this Article does not apply—*Patdaya v. Secretary of State*, 48 Bom. 61, 25 Bom. L.R. 1160, A.I.R. 1924 Bom. 273, 82 I.C. 577.

An order by which land belonging to the plaintiffs was given by the Collector to others without any warrant of law, is an absolute nullity, and need not be set aside under this Article. The plaintiffs can bring a suit for possession of the land—*Rajani Kant v. Ram Dulal*, 17 C.W.N. 55, 17 I.C. 881.

289. Suits under this Article—Where the act or order of the Government officer is not a nullity, it is binding on the plaintiff unless and until it is set aside, and a suit by the plaintiff, even though it is framed as a suit for possession or for declaration..

would be governed by this Article. Thus, a suit for a declaration that the plaintiff is entitled to hold the land free of the assessment and for recovery of the assessment collected by the Government, is governed by this Article, as the plaintiff is not entitled to the declaration without getting the Collector's order set aside—*Subanna v. Secretary of State*, 1915 M.W.N. 915, 31 I.C. 267. Under Article 14, the question is not merely of form but also of substance. For instance, it does not suffice for an officer of Government to purport to act in his official capacity to bring his act or order within the purview of Art. 14, or for the subject to allege that the act was wrong or to refrain from expressly asking the Court to set aside the order to take it out of the purview of the Article. If that act or order is illegal or *ultra vires*, Art. 14 has no application. But if from the facts of the suit, which is framed as a suit for declaration and injunction, it appears that the plaintiff has no other cause of action except the order of the Government officer against which the declaration is sought, then the suit is in substance a suit to set aside the order, and Art. 14 would apply—*Sulleman v. Secy. of State*, 30 Bom.L.R. 431, 109 I.C. 545, A.I.R. 1928 Bom. 180 (181). This Article applies where the order is binding on the plaintiff if not set aside. Thus, in a partition proceeding before the Collector under the Estates Partition Act, the plaintiff contended that certain land measured as part of the estate under partition was not part of the estate but appertained to his *howla*. The Revenue authorities enquired into his contention under sec. 116 of the Act and decided it against him. More than a year afterwards, the plaintiff brought a suit for a declaration that the disputed land was part of his *howla*. Held that the Revenue authorities had jurisdiction to enquire into his plea, hence the plaintiff was bound by their order; and the present suit not being brought within one year from the date of the order was barred under this Article—*Parbati v. Raj Mohan*, 29 Cal. 367. Certain Bhagdari lands were lost by diluvion. The Commissioner ordered them to be treated as Government waste. Subsequently the submerged lands were reformed by alluvion. The occupants filed a suit claiming them as part of their holdings. Held that the suit was governed by this Article and must be brought within one year of the date of the Commissioner's order—*Surajlal v. Secretary of State*, 28 Bom. L.R. 641, A.I.R. 1926 Bom. 467, 95 I.C. 950. A suit for cancellation or modification of rent settled by a Settlement Officer having jurisdiction to settle the rent, is governed by this Article, although the suit is in the guise of one for the modification of the certificate of rent granted by the officer—*Ashutosh v. Abdul*, 28 Cal. 676. A suit for a declaration that the order of the Commissioner under sec. 178 of the Bombay District Municipalities Act is illegal, is governed by the one year's rule prescribed by Article 14, and time runs from the date of the Commissioner's order—*Manibhai v. Nadiad City Municipality*, 51 Bom. 105, A.I.R. 1927 Bom. 55, 100 I.C. 98. Where on an application by the plaintiff for redemption under the Punjab Redemption of Mortgages Act (II of 1913) the Collector passed an order that the mortgage had ceased to exist and redemption was barred, a suit by the plaintiff to redeem the mortgage is eventually a suit

to set aside the Collector's order and falls under Article 14; therefore it is barred if brought more than a year after the date of the Collector's order—*Kaura v. Ram Chand*, 6 Lah. 206, 26 P.L.R. 383, 88 I.C. 945. Where an auction-purchaser at an execution sale held by a Collector, which was subsequently ordered to be set aside, brought a suit for a declaration that the order setting aside the sale be declared ineffectual, and for possession of the property, it was held that the suit was in effect one to set aside the order, though there were not the precise words in the prayer, and that it was governed by Art. 14—*Raghunath v. Kaniz*, 24 All. 467. A suit under sec. 83 of the C. P. Land Revenue Act for the amendment of settlement entries is not a suit for a declaration that the entries are erroneous but a suit for nullifying something which an officer of Government has done, and is governed by Article 14 and not by Article 120—*Onkar Lal v. Shaligram*, 5 N.L.J. 199, A.I.R. 1922 Nag. 76. A suit for possession of land on the ground that it was plaintiff's property and that the grant of a lease thereof by the Collector to the defendant for building purposes under section 37 of the Bombay Land Revenue Code was not proper, is governed by this Article, because the Collector's order leasing the land to the defendant is binding on the plaintiff unless it is set aside—*Nagu v. Salu*, 15 Bom. 424.

290. Suits not under this Article—If the act or order of the Government officer is a mere nullity, so that no suit is necessary to set it aside (note 288 above) and the suit is one for declaration of the plaintiff's proprietary right to land and for possession, Art. 14 has no application. Such a suit is not barred if not brought within one year of the date of the order—*Balvant v. Secy. of State*, 29 Bom. 480 (488, 489), *Agin Bindh v. Mohan*, 30 Cal. 20 (27). Thus, a suit under section 109 of the Bengal Tenancy Act for a declaration that an undisputed entry in the *Khawati* and *Khatian* is erroneous does not fall under this Article—*Agin Bindh v. Mohan Bikram*, supra. The demarcation of land as *peramboke* does not necessarily interfere with the possession of the owner; consequently the order under which such demarcation is made need not be set aside under this Article, but the plaintiff can sue for possession within 12 years from the date when he is actually dispossessed—*Krishnamma v. Achayya*, 2 Mad. 306.

Where the plaintiff was not a party to the order of the Collector passed under sec. 116 of the Bengal Estates Partition Act, he will not be affected by the order, and is not bound to set it aside by a suit brought under this Article; he can sue for possession of the land—*Laloo Singh v. Purna Chander*, 24 Cal. 149. Where the Revenue Officer rejected the plaintiff's application for partition of a *shamilat*, a suit for a declaration of his title to a share therein is governed by Art. 120. As the Revenue officer had no jurisdiction to decide the question of title, and as this suit is not one for setting aside his order, Art. 14 is not applicable—*Kalu Khan v. Umda*, 47 P.R. 1916, 34 I.C. 546, 150 P.L.R. 1916.

The Civil Court has no power to set aside an order passed by the Revenue Authorities under the Land Registration Act; therefore no suit

lies in a Civil Court to set aside such order. If, however, a suit is brought to have such order set aside and for a declaration of the plaintiff's right and title to a certain property, *held* that the prayer to have the order set aside must be treated as a surplusage, that the suit is one simply for declaration of the plaintiff's title in respect of the property, and that this Article does not apply—*Luchmon Sahai v. Kanchun*, 10 Cal. 525. A suit which is essentially one for declaration of title under sec. 66 (2) C. P. Land Revenue Act, though its effect is to set aside an order passed by a Settlement officer, does not come within the purview of Art. 14, but falls under Art. 120—*Rao Sardarsingh v. Rao Vishalsingh*, 26 N.L.R. 94, A.I.R. 1930, Nag. 92 (95), 120 I.C. 321.

In a partition proceeding under the Bengal Estates Partition Act a dispute arose as to whether certain plots of land were included in the property to be partitioned, and upon enquiry the Collector passed an order under sec. 115 of that Act, directing that the partition proceedings be struck off. Four years after, the plaintiffs brought a suit for possession of certain plots of land on declaration of title thereto. *Held* that the suit was not governed by this Article, as it was not a suit to set aside the order of the Collector but to obtain possession of certain lands. The order of the Collector staying and striking off the partition proceedings until the parties had had the matter in dispute between them decided by a Court of competent jurisdiction, could not be regarded as in any way standing in the way of the plaintiffs obtaining the relief which they claim in the suit, and it was therefore unnecessary for the plaintiffs to have that order set aside—*Rajchandra v. Fazluddin*, 32 Cal 716. Where a property which did not fall in any way within the estate which was being partitioned under the Bengal Estates Partition Act 1897, was allotted to one of the persons who was a party to the partition proceedings, the owner of that property can bring a suit for declaration of his title and if necessary for recovery of possession, within 12 years. Article 14 cannot apply. In such a case there is no act or order of an officer of Government in his official capacity. Moreover, it matters not whether the plaintiff in such a suit was a party to the partition proceedings or not—*Ajodhya Prasad v. Ram Khelawan*, 6 Pat. 73, A.I.R. 1926 Pat. 421, 96 I.C. 632. The plaintiff attempted to take possession of certain lands allotted to him in Batwara proceedings (under the Bengal Estates Partition Act, 1897) but he was resisted by the defendant who was in possession of those lands, and this led to criminal proceedings in the Magistrate's Court. The plaintiff was referred to assert his right in the Civil Court and he brought a suit for possession of those lands. *Held* that the suit did not fall under this Article, as it was not a suit to set aside any order of the Revenue Officer (on the other hand it was a suit based on the order of the Revenue Officer allotting certain lands to the plaintiff). It was simply an action in ejectment, its main purpose being to recover possession of certain lands allotted to the plaintiff—*Dhakeshwar v. Gulab Koer*, 5 Pat. 735 (P.C.), 7 P.L.T. 483, 53 I.A. 176, A.I.R. 1926 P.C. 60, 97 I.C. 217.

291. Act or order of Government officer :—A Judge exercising his judicial functions is a Civil Court, and not a Government

Officer acting in his official capacity within the meaning of Art. 14—*Gobindabala v. Ganu*, 10 Bom L.R. 749. Where an objection under section 103A of the Bengal Tenancy Act, to an entry in the Draft Record of Rights has been rejected by the Revenue Officer, such rejection has no finality and cannot be said to be an order of a Government Officer within the meaning of this Article—*Ram Golam v. Bishnu*, 11 C.W.N. 48. So also, an order of the Collector under sec. 3 (5) of the Madras Estates Land Act is a temporary or provisional order, and no finality is given to it. The order will *ipso facto* be vacated whenever a Civil Court pronounces on the rights of the contending parties, and need not be set aside within one year under this Article—*Vannisami v. Chellasami*, 1921 M.W.N. 193, 62 I.C. 276. Certain lands in a village were held on *khoti* tenure by the defendants and the plaintiffs were the *khots* of the village. A Survey Settlement Officer decided in 1882 that the lands held by the defendants were *dhara* lands of the defendants and in 1889 an entry to that effect was made in the Survey Register. Meanwhile in 1887 the plaintiffs brought the present suit for a declaration that the lands in dispute were their *khoti* lands. Held, that the decision of the Survey Settlement Officer in 1882 was not an order, because section 21 of the Khoti Settlement Act (Bombay Act I of 1820) does not contemplate an "order" being made by the Survey Officer between the parties. Even if the framing of the register be regarded as an 'act' of the Survey Officer, that act was not done until 1889, nearly two years after the suit. The suit is not therefore affected by Article 14 of the Limitation Act. It falls under Article 120 and is not barred, being brought within six years from 1882—*Faki v. Sajnak*, 13 Bom. 244.

292. When time runs :—Time runs from the date of the order, and not from the date of the final order in appeal confirming the original order—*Chaturbhuj v. Secretary of State*, 22 Bom. L.R. 146, 55 I.C. 591. On the 6th May 1911 the Collector ordered that a survey number belonging to the plaintiff be forfeited to Government for arrears due on the *khata*. The plaintiff appealed to the Commissioner against this order, and the appeal being dismissed the plaintiff filed a suit on the 14th October 1911. The suit was barred by limitation as it was not brought within one year from the date of the Collector's order of forfeiture—*Ganesh v. Secretary of State*, 41 Bom. 451, 57 I.C. 587.

15.—Against Govern-	One	When the attachment,
ment to set aside	year.	lease or transfer is
any attachment,		made,
lease or transfer of		
immoveable pro-		
perty by the revenue		

authorities for arrears of Government revenue.

292A. When a *ghatual* becomes a defaulter, the Government can transfer the tenure to some other person. A suit to set aside the transfer in such a case is governed by this Article—*Chitra Nair v. Assistant Commissioner*, 14 W.R. 203.

16.—Against Government to recover money paid under protest in satisfaction of a claim made by the revenue-authorities on account of arrears of revenue or on account of demands recoverable as such arrears. One year. When the payment is made.

293. Application of Article .—Where penal assessment was levied for unauthorised occupation of Government land, and this amount had been paid under coercion, a suit to recover the amount so paid would be subject to the one year's rule of limitation under Art. 14 or Art. 16—*Meera v. Secretary of State*, 13 M.L.J. 269

Where a person pays water-cess under protest on a demand being made by the Government for alleged unauthorised use of water belonging to Government, and then brings a suit for the recovery of the water cess illegally levied by the Government, the suit does not fall under sec. 59 of the Madras Revenue Recovery Act, because the mere demand of the water-cess by the Government does not amount to a proceeding under that Act, and the person making the payment cannot be said to be a person 'aggrieved by a proceeding' within the meaning of sec. 59 of that Act. The suit falls under Article 16 of the Limitation Act—*Secretary of State v. Venkataratnam*, 46 Mad 488 (501, 502), 45 M.L.J. 12, A.I.R. 1923 Mad 652 (dissenting from *Orr v. Secretary of State*, 23 Mad 571), *Secretary of State v. Nagaraja*, 44 M.L.J. 645, 74 I.C. 281, A.I.R. 1923 Mad 665; *Ravula Vengala Reddi v. Secretary of State*, 46 Mad 502 (Foot note), 15 I.C. 328; *Puchalapalli Pichi Reddi v. Secretary of State*, 70 I.C. 884, 46 Mad 503 (Foot note), *Ravula Nagamma v. Secretary of State*, 1913 M.W.N. 75, 18 I.C. 699; *Secretary of State v. Rangarajakamma*, 12 L.W. 334, 59 I.C. 98; *Pitchayya v. Secretary of State*, 21 L.W. 155, A.I.R. 1925 Mad. 474.

Actual formal protest is not necessary every time the payment is made. An objection to the Collector against payment of Revenue assess-

ment, followed by a fruitless appeal to the Commissioner would constitute sufficient protest; and subsequent payments, though made without any further protest, would fall within the description of "money paid under protest"—*Kebul Ram v. Government*, 5 W.R. 47 (*per Seton-Kerr J.*); But Macpherson J. held in this case that the subsequent payments did not amount to payments made under protest.

Where a person has paid several years' assessment under protest, he can only recover the payment for the last of such years under this Article—*Bhujang v. Collector of Belgaum*, 11 B.H.C.R. 1; *Kebul Ram v. Government*, 5 W.R. 47; *Secretary of State v. Ranganayakamma*, 12 L.W. 334, 59 I.C. 98. But he may sue to set aside the order of the Collector within six years under Article 120—*Kebul Ram*, *supra*; or he can bring a suit to establish his right to hold the land free of assessment, within 12 years from the time when his right was first interfered with—*Bhujang v. Collector*, *supra*.

17.—Against Govern- ment for compensa- tion for land acquir- ed for public pur- poses.	One year.	The date of determin- ing the amount of the compensation.
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294. Art. 17 has no application where the amount of compensation has not been determined. Where the Collector refuses to award any compensation for the land acquired, on the ground that the plaintiff is not entitled to any compensation, a suit to recover compensation would be governed by Art. 120 and not by this Article—*Rameswar Singh v. Secretary of State*, 34 Cal. 470. This Article is confined to a suit against Government; it does not apply to a suit by a person who is entitled to compensation awarded by Government against a person who has wrongfully received it—*Nund Lal v. Mir Abu*, 5 Cal. 597. Article 62 would govern such a suit.

The old Land Acquisition Act X of 1870 did not provide for or contemplate an award for compensation being enforced against the Collector by execution proceedings, and there was no general law which enabled a Civil Court to enforce the award by means of execution proceedings. The ordinary mode of enforcing an award was by a suit against the Collector and such suit was governed by Article 17 of the Limitation Act—*Nilkanth v. Collector of Thana*, 22 Bom. 802 (807) (F.B.).

18.—Like suit for com- pensation when the acquisition is not completed.	One year.	The date of the refusal to complete.
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295. Art. 18 applies to suits for compensation for damages suffered by the owner by reason of the Government's withdrawing from acquisition (See section 48 of the Land Acquisition Act I of 1894). But where the acquisition has been completed, and the Collector refuses to award any

compensation, a suit to recover compensation is governed by Art. 120—*Rameswar v. Secretary of State*, 34 Cal. 470. The plaintiffs' land was taken by the Government for railway purposes and the Collector took possession of it before an award was made. He, however, refused to pass an award in as much as he held that the land was Government land and that in consequence no compensation was payable to the plaintiffs. The plaintiffs brought a suit for declaration of title, and for possession or in the alternative for damages for the wrongful refusal of the Collector to make an award stating the amount of compensation payable to them. *Held* that as the land had already vested in the Government, the plaintiffs were not entitled to recover possession or to a declaration of title; but that they were entitled to claim damages for breach of statutory duty on the Collector's part (*viz* refusal to make an award), the measure of damages being such compensation as would have been recovered by the plaintiffs if the Collector had made an award, and the suit was governed by Article 120. Article 18 which applies to a suit for compensation when the acquisition is not completed, could not apply, as in this case the acquisition had been completed in this sense that the property had absolutely vested in the Government—*Mantharavadi v. Secretary of State*, 27 Mad. 535

19.—For compensation One When the imprisonment
for false imprison- year. ends.
ment.

296. Imprisonment—Imprisonment amounts to total restraint of liberty for some period however short. A partial restraint as the prevention from going in one direction or in all directions but one, will not constitute an imprisonment—*Bird v Jones*, (1845) 7 Q B 742. Nothing short of actual detention and complete loss of freedom will support an action for false imprisonment. A person who is released on bail can no longer be regarded as under imprisonment so long as he is on bail, his imprisonment ends there, and the period of limitation for an action for false imprisonment begins to run from the date on which he was enlarged on bail—*Mahammad Yusufuddin v Secretary of State*, 30 Cal. 872 (P.C.).

In a case of false imprisonment, the question arises, who is liable for the imprisonment—the party who takes out the warrant, or the Court which issued the warrant? The principle is that when a Court acts within its jurisdiction, but erroneously, then the party who takes out the warrant is not liable, but when the Court has no jurisdiction to issue the warrant, the whole proceeding is *coram non jure*, and the party is liable. In this case, two officers of the Court by mistake, in spite of the decree having been already completely satisfied, issued a certificate of non-payment of the judgment-debt and a writ of arrest of the judgment-debtor. The Court had jurisdiction over the matter, and therefore the liability fell upon the two officers (and therefore upon the Court), because the proceedings which ended in the wrongful arrest arose from some fault on their part—*Fisher v. Pearce*, 9 Bom 1

A suit for damages for false imprisonment or malicious prosecution, even though it is brought against several joint tort-feasors is governed

by the one year's rule under Article 19 or 23. The fact that there are several tort-feasors and that there was a conspiracy between them does not constitute a distinct cause of action by itself, so as to take the case out of this Article. A tort when committed by several individuals is not different from the same tort committed by a single individual. A malicious prosecution is a malicious prosecution, whether it is brought about by one person or by more. The combination in such cases may be an element of aggravation in the assessment of damages, but does not make it a different tort. The Legislature has made a general provision that suits for damages for false imprisonment or malicious prosecution must be brought within a certain period, and no distinction is made in respect of the number of persons by whom the wrong may have been perpetrated—*Weston v. Peary Mohan Das*, 40 Cal 898 (949, 951, 952), 18 C.W.N. 185.

Limitation runs from the time when the imprisonment *ends*, and not from the *date of imprisonment*, as erroneously remarked by Scott J. in *Fisher v. Pearse*, 9 Bom. 1 (at p. 9).

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| <p>20.—By executors, administrators or representatives under the Legal Representatives' Suits Act, XII of 1855.</p> | <p>One year.</p> | <p>The date of the death of the person wronged.</p> |
| <p>21.—By executors, administrators or representatives under the Indian Fatal Accidents Act, XIII of 1855.</p> | <p>One year.</p> | <p>The date of the death of the person killed.</p> |

297. The word 'representative' in this Article and in Act XIII of 1855 does not mean only executors or administrators but includes all or any of the persons (e.g. widow, children) for whose benefit a suit may be brought under that Act, and it makes no difference whether the deceased was a European or a Eurasian—*Johnson v. Madras Railway Company*, 28 Mad. 479 (481).

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| <p>22.—For compensation for any other injury to the person.</p> | <p>One year.</p> | <p>When the injury is committed.</p> |
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298. A suit for damages or compensation for injury caused to a person's reputation and for mental pain arising out of an assault is governed by Art. 22 and not by Art. 36, because the cause of action is the injury to the person caused by the assault, and the insult arising from assault does not constitute a separate cause of action. Assault itself is the cause of action, though damages may be awarded for the resulting

insult—*Arhat v. Baldeo*, 5 I C. 124 (125) A suit for damages for personal injury caused by throwing sulphuric acid on the face is governed by this Article and not by Article 36, because the case is specially provided for by Article 22 Time begins to run from the date of the injurious act done, and the continuance of the effect up to a later time does not make the wrong a continuing wrong giving rise to a continuous cause of action under sec. 23; sec 24 also would not extend the period, because the cause of action arose as soon as the sulphuric acid was thrown, irrespective of any subsequent specific injury—*Abdulla v. Abdulla*, 25 Bom. L.R. 1333, A.I.R. 1924 Bom 290, 84 I C. 796

<p>23.—For compensation for a malicious prosecution.</p>	<p>One year.</p>	<p>When the plaintiff is acquitted or the prosecution is otherwise terminated.</p>
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See *Weston v. Peary Mohan*, 40 Cal. 898 cited under Art. 19.

299. Prosecution :—The word 'prosecution' means in strict technical language a proceeding either by way of indictment or information of the Criminal Court in order to put an offender in his trial, the exhibition of a criminal charge against a person before a Court of justice, and in general language the institution and carrying on of legal proceedings against a person (*Murray's English Dictionary*) The word 'prosecution' has not been defined in any statutory enactment It is a word of very wide significance and does not merely mean an actual trial or an enquiry which may result in a conviction, and the imposition of imprisonment and fine An application in revision under sec 436 Cr P Code for ordering a further inquiry or retrial is a prosecution—*Madan Mohan v Ram Sundar*, 28 A L J 885, A I R 1930 All 326 (327), 125 I C 464 Malicious Prosecution means the setting the machinery of the criminal law in motion without reasonable or probable cause—*Bishun Narain v Phulman*, 19 C.W N 935, 27 I C 449 An application for binding down a person under sec 107 Cr P. Code amounts to a prosecution—*Md Nizullah v. Jai Ram*, 41 All 503, 50 I C 140; *Crowdy v Reilly*, 17 C W N 554, 18 I C 737 A statement made to the Police against the plaintiff, which is afterwards found to be false, in consequence of which no action is taken by the Magistrate, is not a ground for an action for malicious prosecution but may constitute libel or slander—*Ishri v Muhammad*, 24 All 368 When proceedings are taken against a person under the Bengal Disorderly Houses Act, it cannot be said that he has been prosecuted, therefore a suit for damages in respect of the proceedings is not one for malicious prosecution under this Article The suit falls under Article 24—*Dhiraibala v Gopalchandra*, 18 C L J 352, 20 I C 768

300. Starting point of limitation — If the prosecution ends in *acquittal*, then according to the clear language of the third column of this Article, the period of limitation for a suit for damages for malicious prosecution begins to run from the date of the acquittal, and not from the date of dismissal of a revision-petition preferred before the District

Magistrate against the order of acquittal. It could not be said that by reason of the complainant's moving the District Magistrate for making an order of reference to the High Court, the order of acquittal had ceased to be final and the prosecution had not terminated—*Narayya v. Seshayya*, 23 Mad. 24 (25). If an order of discharge is passed, and no further proceedings are taken, the prosecution must be deemed to have terminated on the date of discharge, and limitation for a suit for damages for malicious prosecution would run from that date—*Madan Mohan v. Ram Sundar*, 28 A.L.J. 885, A.I.R. 1930 All. 326 (328), *Pursottam v. Ravji*, 47 Bom. 28 (30). The Bombay High Court further holds that even if proceedings by way of revision petition are taken against an order of discharge, the plaintiff's cause of action for a suit for damages for malicious prosecution would arise immediately on the Magistrate's order of discharge (since the discharge of an accused person is the termination of the prosecution) and would not be suspended because further proceedings might be taken by way of revision petition to the High Court either by the Government or by the complainant in order to get the order of discharge set aside. No fresh cause of action would arise on the dismissal of the revision petition—*Purshottam v. Ravji*, 47 Bom. 28, 24 Bom.L.R. 507, A.I.R. 1922 Bom. 209. The Madras High Court is of opinion that where the Magistrate passed an order of discharge and the complainant moved the District Magistrate in revision who directed further inquiry, but on further application the High Court set aside the District Magistrate's order and altered the order of the first Court into an order of acquittal, whereupon the accused brought a suit for damages for malicious prosecution, held that time ran from the date of the order of the High Court and not from the date of the first Court's order, because owing to the proceedings resulting in an order for further inquiry, the prosecution was revived and did not terminate until the passing of the order of the High Court—*Tanguturi Sriramulu v. Viresalingam*, 57 I.C. 635 (636). According to the Allahabad High Court also, if proceedings are taken up in revision against the order of discharge, the prosecution cannot be said to have finally terminated; it must be deemed to be continuing while the revisional proceedings are pending; its final termination would be only when the proceedings in revision have come to an end in favour of the discharged person. If this view were not to be accepted, the result would be that the discharged person would be compelled to institute his suit for damages even though the matter is still sub judice and is being considered by the Revision Court—*Madan Mohan v. Ram Sundar*, 28 A.L.J. 885, A.I.R. 1930 All. 326 (328), 125 I.C. 464 (dissenting from 47 Bom. 28). The Bombay High Court has drawn a distinction between cases in which the revision petition is dismissed and the cases in which a revision petition made to the District Magistrate or Sessions Judge is successful but is finally unsuccessful in the High Court. If the revision petition is dismissed, the cause of action arises on the Magistrate's order of discharge, but if a revisional application is successful, and the criminal proceedings are directed to be continued, then there is no longer any cause of action because the plaintiff is no longer a discharged person, and he has to wait until the prosecution terminates in a

his favour (by a final order of the High Court) before his cause of action arises again—*Purushottam v. Rayji*, 47 Bom. 28 (30), A.I.R. 1922 Bom. 209.

If the plaintiff (accused) is convicted by the Magistrate, but is acquitted on appeal, limitation will run from the date of acquittal on appeal—*Huri Mohan v. Naimuddin*, 20 Cal. 41. Limitation runs from the date of actual acquittal or discharge by the Magistrate as it appears from the records of the case, and not from any earlier date on which the Court expressed an opinion that there was no case to put the accused on trial and that he should be discharged—*Shuppu v. Sivarama*, 1912 M.W.N. 951, 16 I.C. 584. If there is an appeal by the Government against the order of acquittal, the prosecution cannot be said to have terminated while the appeal is pending—*Madan Mohan v. Ram Sundar*, *supra*, *Narayya v. Seshayya*, 23 Mad. 24 (25). Where an accused is discharged in the middle of the case *before the prosecution as a whole terminates*, without any formal order of acquittal or discharge, the date of the judgment afterwards pronounced and not the date of the discharge, would be the starting point of limitation—*Venkataramana v. Swami Naik*, 17 M.L.J. 60.

24.—For compensation One When the libel is published for libel. year. lished.

See 24 All. 368 and 18 C.L.J. 352 cited under Article 23.

301. Limitation runs from the date when the libel is published. But since each publication gives a fresh cause of action, it is not necessary that all or the first of the publications (e.g. in a newspaper) should have been within a year, it is sufficient if any one publication is proved to have been within one year—*Duke of Brunswick v. Harmer*, (1849) 14 Q.B. 185.

25.—For compensation One When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results.

302. Slander—special damage :—The English law under which slanderous words are generally not actionable *per se* and are actionable only when special damage results is not applicable to this country; the law of British India recognises personal result conveyed by abusive language as actionable *per se* without proof of special damage—*Dawan v. Mahip*, 10 All. 425, *Parvati v. Mannar*, 8 Mad. 175. Thus, where abusive language was uttered, an action would lie for damages, though no special damage is proved to have been suffered by the plaintiff—*Shoobhagee v. Bokhari*, 4 C.L.J. 390, *Jogeswar v. Dinaram*, 3 C.L.J. 140, *Ibin v. Haidar*, 12 Cal. 109 (headnote incorrect); *Troilokya v. Chandra*, 12 Cal. 424.

But in *Girish v. Jatadhari*, 26 Cal. 653 (F.B.) it was held that if there was no *defamation* or intent to defame, mere abusive and insulting language was not actionable, even though it caused pain and distress of mind to the plaintiff.

The words in the third column "if the words are not actionable . . . results" are words of English law, and should be applied only to Presidency Towns where the English law is generally applied. Thus, in a case arising within the local limits of the town of Calcutta, it was held, following the English law, that slanderous words alone, (e.g. imputation of unchastity to women) without proof of special damage are not actionable—*Bhooni v. Natobar*, 28 Cal. 452. But in a *mofussil* case, where A used words imputing unchastity to the wife of B, it was held that the words were defamatory not only of the wife of B, but also of B himself and B was therefore entitled to sue on his own account—*Sukhan v. Bipid*, 34 Cal. 48.

- 26.—For compensation One When the loss occurs.
for loss of service year.
occasioned by the
seduction of the
plaintiff's servant or
daughter.

303. If the daughter had been married but deserted by her husband, and was under her father's protection and performing household duties for him, he had by law and custom a right to the service of the daughter, and a suit by him was maintainable for the loss of his daughter's service through seduction—*Ram Lall v. Tula Ram*, 4 All 97 (*per* Stuart C.J.). But Oldfield J. held in this case that such a suit was not maintainable by a Hindu father.

- 27.—For compensation One The date of the breach.
for inducing a per- year.
son to break a con-
tract with the plain-
tiff.

303A. The plaintiff and defendant were rival transport contractors to the British Government in connection with certain military operations, the defendant improperly enticed the *jamadars* of the plaintiff into breaking their contracts by putting the camels, which they had contracted to supply to the plaintiff, at the disposal of the defendant. *Held* that a suit for compensation against the defendant was governed by this Article—*Haveli v. Shaik Panda*, 96 I.C. 887 (P.C.), A I.R. 1926 P.C. 88, 31 C.W.N. 174.

- 28.—For compensation One The date of the distress.
for an illegal, irre- year.
gular or excessive
distress.

304. For a full discussion as to the meaning of the word "compensation" see Note 305 under the next Article. It has been held in a Bombay case that where the suit was to recover the amount that was illegally levied in excess, the suit was not governed by this Article but by Art. 62—*Ladji v. Musabi*, 10 Bom 665. No reason has been stated for the inapplicability of this Article, but probably the learned Judge interpreted the word 'compensation' in its narrower sense (i.e., in the sense of *damages*). A suit against a Municipal Board for compensation for illegal or excessive distress is governed by the specific provisions of this Article and not by Article 2 (which is more general)—*Municipal Board v. Goodall*, 26 All 482. A suit against a landlord for compensation for illegal distraint of crops is governed by Art 28 or 29—*Jagatjiban v Sarat*, 7 C.W.N 728. Where an illegal distraint was made by a landlord under Madras Rent Recovery Act VIII of 1865, a suit for compensation brought within one year of the distraint was in time—*Yamuna Bai v Solayya*, 24 Mad 339.

**29.—For compensation One The date of the seizure.
for wrongful seizure year.
of moveable pro-
perty under legal
process.**

305. Compensation.—In *Murugesu v. Jattaram*, 23 Mad 621 (626) it has been held that the word "compensation" must be interpreted in its wider sense, so as to include a claim to recover the *value* of the goods seized, as well as a claim by way of *damages* independent of the value of the goods, and is not restricted to the latter class of claim alone; and that this Article does not contemplate any such distinction. See also *Yellammal v Ayyappa*, 38 Mad 972 (at p 984, per Sadasiva Aiyar J) and *Narasimha v Gangaraju*, 31 Mad 431 (433) where the same opinion was expressed. Similarly, in *Jagivan v. Gulam Jilani*, 8 Bom. 17, it was held that a suit simply to recover the money wrongfully taken under a decree was a suit for compensation under this Article; and so in *Venkatachellum v Nagappa*, 23 M L J 519, 16 I C. 914, this Article was held to be applicable to a suit for refund of sale-proceeds realized by sale of plaintiff's property by wrongful attachment.

But the Calcutta and Allahabad High Courts are of opinion that the word 'compensation' presupposes that the plaintiff must have been damaged, and the suit must be by way of *damages*, a suit by the plaintiff merely to recover the money wrongfully attached and taken away by the defendant in execution of the latter's decree against a third party is not a suit for *compensation* under this Article but is governed by Article 61—*Lakshmi Priya v. Ramakanta*, 30 Cal 440 (dissenting from 8 Bom. 17), *Niadar Singh v. Ganga Dei*, 38 All 676 (dissenting from 8 Bom 17). See also *Rajputana Malwa Railway Stores v Ajmere Municipal Board*, 32 All 491, and *Municipal Board v Deokinandan* 36 All 555 (cited under Article 2) and *Yellammal v Ayyappa*, 38 Mad 972 (per Sundara Aiyer J at p. 976), where the word has been applied only to a claim for *damages*.

306. Wrongful seizure :—Seizure or possession of property belonging to a party to a suit under an order of Court is not *wrongful*, although the order was erroneous and was afterwards set aside—*Dakhina v. Saroda*, 21 Cal. 142 (148) (P.C.). Drawing out money from the Court under the terms of a subsisting decree is not *wrongful* seizure of property, even though the decree is afterwards set aside—*Narayan v. Narayan*, 13 Mad. 437. Where money belonging to the plaintiff, which was deposited in the Collectorate was wrongfully attached and drawn out by the defendant, a suit to recover the money does not fall under this Article (but under Art. 62), because the plaintiff is damnified by the *wrongful taking out* and not by the wrongful attachment or seizure of the money—*Lakshmi v. Ram*, 30 Cal 440 Wrongful attachment of money deposited with the Collectorate is wrongful seizure of *moveable property*—*Jaggiivan v. Gulam Jilani*, 8 Bom 17 Where a warrant of attachment was executed by affixing the Court seal to the outer door of the warehouse where the goods were stored, without breaking open the door and taking physical possession of the goods inside, this was held to be in effect an *actual seizure*, and a suit for damages for such seizure fell under Art. 29—*Multan Chand v. Bank of Madras*, 27 Mad 346

The word 'seizure' means the taking of something out of the possession of its *owner*. Where the moveable property (money) was in the custody of the *Court*, and the Court distributed it among the judgment-creditors of the owner, there was no 'seizure' within the meaning of this Article—*Ram Narain v. Brij Banke*, 39 All 322 (329), 15 A.L.J. 295, 39 I.C 532; *Rupabai v. Audimulam*, 11 Mad. 345, *Rajaram v. Mulchand*, 7 N.L.J. 140, A.I.R. 1924 Nag 248. Money paid by order of Court is not money seized by order of Court—*Rupabai v. Audimulam*, 11 Mad 345 (355).

An *attachment of a debt* is not a seizure. Seizure involves something in the nature of a transfer of possession. The attachment of a debt is made by a written order prohibiting the creditor from receiving the debt and the debtor from making payment thereof, until the further order of the Court (see O. 21, rule 46, C. P. Code). No *transfer of possession* is contemplated by the prohibitory order—*Yellammal v. Ayyappa*, 38 Mad 972 (987). Not only in the case of debts, but also in the case of ordinary moveable property, where the attachment is made not by actual seizure but by prohibitory order under O. 21, r. 46, C. P. Code, Article 29 does not apply. A suit for compensation for attachment of a moveable property by prohibitory order falls under Article 36—*P. Veeramma v. Subba Rao*, 31 M.L.J. 257, 35 I.C 98 (100, 101).

The word 'seizure' means taking hostile possession, and not taking possession of what another *voluntarily* gives. Therefore where a debt is attached and the debtor makes a voluntary payment of the debt into Court, such payment does not constitute a seizure. Hence if the amount of debt is paid by the Court to the decreeholder, a suit by the claimant of the debt against the decreeholder is governed by either Art. 62 or 120—*Yellammal v. Ayyappa*, 38 Mad 972 (974, 987), 26 M.L.J. 166, 22 I.C. 870 In this case it has been further held (at page 974) that a debt not

being a moveable property, the attachment of a debt is not a seizure of moveable property under this Article.

Where the defendants had brought a suit against the plaintiffs for sums due to them on account of maritime necessities supplied to the plaintiffs' ship, and obtained an warrant of arrest of the ship, but the suit was afterwards dismissed for want of jurisdiction, held that the arrest of the ship was a seizure under legal process. The fact that the suit was dismissed for want of jurisdiction did not render the order for arrest a nullity. The seizure was therefore under a 'legal process'—*Madras Steam Navigation Co., Ltd. v. Shalimar Works, Ltd.*, 42 Cal. 85 (108), 28 I.C. 463. Art 29 is not limited in its application to cases in which the seizure is intrinsically wrongful, as for instance, where it is made without jurisdiction; it applies also to cases where the foundation of the claim is that the defendant procured the seizure of the plaintiff's property under a perfectly legal process but by misrepresentations to Court—*Sokkalunga v. Krishnaswami*, 38 M.L.J. 324, 55 I.C. 786 (790), 1920 M.W.N. 102. This Article would apply both to cases of seizure under orders passed by a Court without jurisdiction, and to cases of seizure under orders passed by a Court having jurisdiction but on insufficient grounds—*Pannaji v. Senaji*, 53 Mad. 621, A.I.R. 1930 Mad. 635 (642), 126 I.C. 721. Where a seizure is under a writ of Court, it is *prima facie* not wrongful and unless it is shown that the Court issuing the writ had no jurisdiction over the subject matter, a suit for compensation for the seizure would not fall within Art 29. A mere improper attachment is not wrongful attachment—*Arjan Biswas v. Abdul*, 35 C.L.J. 480, 64 I.C. 513, A.I.R. 1921 Cal 774.

The attachment by the decreeholder of the properties of his judgment-debtor is not 'wrongful' by reason of the fact that the vendor of those properties has got a lien on them for his unpaid purchase-money. The judgment-creditors are not under any obligation to enquire at the time of attachment whether the purchase-money due to the vendor has or has not been paid. The seizure is perfectly lawful—*Ram Narain v. Brij Banke*, 39 All. 322 (328).

Attachment before judgment —The attachment of the debtor's property by the creditor before judgment is a lawful seizure, if a decree is afterwards passed in favour of the creditor. The seizure is not wrongful by reason of the fact that it has been effected before the decree. Since the suit is subsequently decreed, the attachment, to all intents and purposes, must be deemed to have been effected in execution of the decree—*Ram Narain v. Brij Banke*, 39 All. 322 (328), *Manga v. Changa Mal*, 22 A.L.J. 977, A.I.R. 1925 All. 131. An attachment before judgment is not wrongful merely because the suit in which the attachment has been made, is dismissed, if it appears that there were sufficient grounds for applying for the attachment—*Manasikraman v. Avisilan* 19 Mad. 80 (81). If the suit in which the attachment before judgment takes place is decreed by the Court of the first instance but is dismissed on appeal the attachment was none the less a lawful seizure and not a wrongful one.

the order of attachment might have been on insufficient grounds, but it was not intrinsically wrongful, that is, there was no wrongful attachment on the day on which the attachment was made. In such a case, Article 36 or 49 applied—*Manga v Changa Mal*, 22 A.L.J. 977, 81 I.C. 1038, A.I.R. 1925 All. 131. But in a recent Madras case it has been held that this Article would apply to all cases of attachment before judgment, where the seizure is wrongful either because the Court had no jurisdiction or because the attachment was made by a Court having jurisdiction but on insufficient grounds; it is not restricted to seizures which are wrongful because made under the order of a Court without jurisdiction or in excess of the order of the Court—*Pannaji v. Senaji*, 53 Mad. 621, A.I.R. 1930 Mad. 635 (642).

Attachment of property of defendant.—It has been said in some cases that a distinction should be drawn between cases where the property of the defendant (in the previous suit) was attached, and cases where the property of a third person was attached. If the property that was attached did not belong to the defendant (in the previous suit) but to a third party, a suit brought by that party for wrongful seizure of his property falls under Article 29—*Narasimha v Ganga Raju*, 31 Mad. 431; *Ram Narain v. Umrao*, 29 All. 615, *Murugesu v. Jattaram*, 23 Mad. 621 (626); *Multan Chand v Bank of Madras*, 27 Mad. 346, *P. Veeramma v. Subba Rao*, 31 M.L.J. 257, 35 I.C. 98. But if the property that was attached belonged to the defendant, there was no wrongful seizure, and the present suit for compensation for the attachment does not fall under Article 29 but under Art. 36. See *Manavikraman v. Avisilan*, 19 Mad. 80; *Arjun v. Abdul*, 35 C.L.J. 480, 64 I.C. 513, A.I.R. 1921 Cal. 774, *Sokkalingam v. Krishnaswami*, 38 M.L.J. 324, 55 I.C. 786 (790). In a recent Madras case, however, the learned Judges, after reviewing all these cases, have disapproved of this distinction, and have laid down that Article 29 should apply even though the property of the defendant had been attached—*Pannaji v. Senaji*, 53 Mad. 621, A.I.R. 1930 Mad. 635 (641), 126 I.C. 721, approving *Madras Steam Navigation Co. v. Shalimar Works*, 42 Cal. 85, in which Art. 29 was applied to a case where the property that had been attached in the previous suit belonged to the defendant.

307. Distraint and removal of crops.—A suit for damages for illegal distraint of standing crops is governed by Art. 36, and not by Art. 29, because standing crops are not 'moveable property' within the meaning of this Article—*Hari Charan v. Hari Kar*, 32 Cal. 459 (462); *Mohesh Chandra v. Hari Kar*, 9 C.W.N. 376. Growing crops until severed from the soil are treated as immoveable property. The definition of moveable property in sec. 2 (13) of the C. P. Code which includes standing crops will not prevail in the Limitation Act—*Devarasetti v. Devarasetti*, 18 M.L.T. 532, 31 I.C. 769, *Surat v. Umar*, 22 Cal. 877 (895); *Pandah v. Jennuddi*, 4 Cal. 665 (667); *Hari Charan v. Hari Kar*, supra, *Murlidhar v. Mulu*, 11 N.L.R. 18, 27 I.C. 935 (936, 937). If the crops are, after the wrongful distraint, cut and carried away by the defendant, they become moveable property, and a suit for damages for

wrongful distraint and removal of the crops is governed by Article 48 or 49 (which is more specific) and not by Art. 36, which is a general Article on torts. Article 29 cannot apply because this Article applies only to the act of wrongful distraint and not to the act of cutting and carrying away the crops—*Jadu Nath v. Hari Kar*, 17 C.W.N. 308 (311) 18 I.C. 253 (overruling *Jadunath v. Hari Kar*, 36 Cal. 141, 12 C.W.N. 1090). See notes under Arts. 36 and 39

307A. Starting point of Limitation :—Limitation runs from the date of the wrongful seizure, and not from the time when the seizure is declared to be wrongful and the plaintiff obtains restoration of the property. A wrongful seizure is wrongful *ab initio*, and the starting point of limitation is the date of the seizure; the wrongfulness or otherwise of the seizure does not depend upon any declaration of the Court. It is not rightful when the Court makes an order on allegations which are subsequently found to be unproved, and becomes wrongful only when the Court on investigation of the facts holds that the defendant had no jurisdiction in attaching the properties. Nor is it correct to say that the period of limitation runs when the seizure terminates. It should be noted that in other Articles where termination of proceeding is necessary to give the plaintiff a cause of action, the Act specially provides for that contingency. For instance, under Art 19, time runs from the date when the imprisonment ends, under Art 23, the period runs when the accused is acquitted or the prosecution is otherwise terminated; under Art. 42, the period commences from the time when the injunction ceases. But in Art 29, the Legislature has not made any such provision but has fixed the period as one year from the date of the seizure. Compare also Art. 28 under which the period similarly commences from the date of the distress—*Pannaji v. Senaji*, 53 Mad 621, A.I.R 1930 Mad 635 (637), 126 IC 721. The words "date of the seizure" are explicit, and it would be doing violence to the language used, if the words are interpreted as meaning the date when the seizure is declared wrongful by a competent Court—*Ibid*

A wrongful seizure (e.g., attachment before judgment) is not a continuing wrong within the meaning of sec. 23, hence time runs from the date of seizure and not when the attachment ceases—*Pannaji v. Senaji*, supra; *Ram Narain v. Umrao*, 29 All 615. But see *Manga v. Changa Mal*, 22 A.L.J 977, 81 I.C. 1038, A.I.R 1925 All. 131

30.—Against a carrier **One** **When the loss or injury**
 for compensation year. **occurs.**
 for losing or injuring
 goods.

[N.B.—The period of limitation under Articles 30 and 31 of the Act of 1877 was originally two years, but by sec 3 of the Limitation Amendment Act X of 1899, it has been reduced to one year.]

308. Carrier :—A 'carrier' in its general sense means a person or a company who undertakes to transport the goods of another person

from one place to another for a hire. It is not necessary for the purposes of Articles 30 and 31 that the carrier should be a 'common carrier' within the meaning of the Carriers Act, 1865—*Mylappa v. B. I. S. N. Co., Ltd.*, 34 M.L.J. 553, 45 I.C. 485. A landing agent is a carrier within the meaning of these Articles—*Ibid.* Sea-going merchantships are carriers within the meaning of these Articles though they are not 'common carriers' as defined in the Carriers Act (III of 1865)—*B. I. S. N. Co. v. Haji Mahomed*, 3 Mad. 107 (110)

309. Suit based on contract :—It has been held in some earlier cases that where there is a contract to deliver, a suit for compensation for breach of the contract is governed by Art. 115. This Article applied to suits for compensation for loss or damage to goods arising from malfeasance, misfeasance or nonfeasance independent of contract—*British India Steam Navigation Company v. Hajee Mahomed*, 3 Mad. 107; *Kalu Ram v. Madras Ry Co.*, 3 Mad 240; *Danmull v. B. I. S. N. Co.*, 12 Cal 477, *Mohan Singh v Henry Conder*, 7 Bom 478. But these decisions were given at a time when the word "non-delivery" did not exist in Article 31, and the Courts had therefore to apply Art. 115 to suits for compensation for non-delivery of goods, treating them as suits for breach of contract to deliver. Article 30 was confined to actions in tort, and Art 31 to actions *ex contractu*. In *G. I. P. Ry. Co. v. Rasett*, 19 Bom. 165, Farran J. however remarked (at p 188) that "the Courts would have better fulfilled the intention of the Legislature by treating all claims against a carrier which would fairly be deemed to arise out of the loss or injury to goods as coming within the purview of articles 30 and 31, than by confining the general words of the former Article to a claim for compensation for loss of goods arising otherwise than out of contract"

Since then the Legislature has added the word "non-delivery" in Article 31 (by the Amendment Act X of 1899) so that that Article is now made more comprehensive and self-contained, and there would be no necessity for bringing in Article 115 into a case of non-delivery. It is now settled law that under Articles 30 and 31 it is immaterial whether the liability of the defendant arises out of contract or of tort. Therefore Article 31 would apply to a suit against a carrier for compensation for non-delivery of goods irrespective of the question whether the suit was laid in contract or in tort—*Venkatasubba Rao v. Asiatic Steam Navigation Co.*, 39 Mad. 1 (12) (F B); *Secretary of State v. Dunlop Rubber Co.*, 6 Lah. 301, A I R. 1925 Lah 478, 88 I C 979, 26 P.L.R. 490; *B. N. Ry. Co. v. Hamir*, 5 Pat. 106, 6 P.L.T 565, A.I R. 1925 Pat. 727; *Moti Ram v E. I. Ry. Co.*, 2 P.L.R. 1907, 108 P.R 1906 (F.B); *Chiranjilal v. B. N. Ry. Co.*, 52 Cal. 372, 29 C.W.N 277. In an earlier case, however, the Calcutta High Court (*Radha Shyam v. Secretary of State*, 44 Cal. 16 at p 26) expressed the opinion that a suit by the consignor against a railway company for compensation for non-delivery of goods would be governed by Article 115, as it was a case of breach of a written contract, the invoice being the contract (see Note 311 under Art 31). The learned

Judge in this case followed the old and obsolete rulings of 7 Bom 474 and 12 Cal. 477.

310. Loss:—A suit against a railway company for compensation for loss of goods, alleging the same to have been due to the wilful negligence or theft by the company's servants is governed by this Article—*E. I. Ry. Co. v. Ram Autar*, 20 C.W.N. 696, 38 I.C. 502. Article 30 is inapplicable to a case where the goods are not lost but are lying in the lost-property office of the railway company because delivery of them has not been claimed by any one. The case is one of non-delivery, and covered by Article 31—*Mutsaddi Lal v. B. B. & C. I. Ry. Co.*, 42 All. 390 (392), 18 A.L.J. 377, 58 I.C. 547. This Article does not apply where the defendant does not plead or prove any loss, but on the other hand pleads that no goods were given to them for consignment—*Radha Shyam v. Secretary of State*, 44 Cal. 16 (26).

If the plaintiff sued the railway company for non-delivery of goods within three years as provided by Article 115 (which was the law before the amendment of 1899) the defendant could not set up a case that the goods were lost in order to bring the case within the shorter period of limitation under Art. 30. The defendant could not ask the Court to infer from the mere non-delivery that the goods were lost; if he sought to avail himself of the shorter period of limitation prescribed by this Article, the burden lay on him to prove, as an affirmative fact, that the goods were lost—*Mohan Sing v. Henry Conder*, 7 Bom. 478 (488). This decision is no longer of any importance, because under the present law loss and non-delivery are provided by an equal period of limitation under Articles 30 and 31.

So also, the burden of proving the time when the goods were lost lies on the defendant—*Madras & South Marhatta Railway Co. v. Bhimappa*, 23 M.L.J. 511, 17 I.C. 419.

The words "against a carrier for losing or injuring goods" obviously suggest not a loss of the goods to the owner but an actual losing of the goods by the carrier himself, and the words "when the loss or injury occurs" in the third column mean that the period of limitation begins to run from the time when the carrier lost or injured the goods, and not from the time when the consignee may be said to have suffered loss. Therefore the burden of proving when the goods were lost is decidedly on the carrier-company. Where the railway company did not prove or admit that the goods were lost but on the other hand they had been continually assuring the plaintiff that the matter was under inquiry and was receiving their special attention up to a period within a year of the suit, the claim of the plaintiff was not barred by Article 30, although the suit was brought more than a year after the despatch of the goods—*Jugal Kishore v. G. I. P. Ry.*, 45 All. 43 (45), 20 A.L.J. 792, 68 I.C. 991, A.I.R. 1923 All. 22.

The term 'loss' does not include *misdelivery*. The word 'loss' in this Article contemplates an actual losing of the goods by the carrier himself, and therefore when the carrier delivers the goods to a wrong person, it cannot be said that he has lost the goods. Neither does Article 31 apply

because misdelivery is not the same as non-delivery. The case of misdelivery therefore falls under Article 115—*Fakir v. Secretary of State*, 170 P.L.R. 1913, 19 I.C. 477, following *Changa Mal v. B. & N. W. Ry. Co.*, 6 P.R. 1897. In a recent Full Bench case of the Lahore High Court, however, it has been held that the word 'loss' in section 80 and other sections of the Railways Act should not be interpreted in the restricted sense of *losing of the goods by the carrier*, but should include loss to the owner as well, and therefore it clearly contemplates a case of *misdelivery*—*Hill Sawyers & Co. v. Secretary of State*, 2 Lah. 133 (F.B.), A.I.R. 1921 Lah. 1, 61 I.C. 926, overruling 6 P.R. 1897. But as it is a case under the Railways Act, it is doubtful whether it should be applied in construing Article 30 of the Limitation Act, since the two Acts are not in *pari materia*. (See 2 Pat. 442, at pp. 446, 448)

310A. Starting point of limitation :—Where on the date on which the consignee went to the railway station to take delivery of the packages, they were missing and there was nothing to show that the goods were lost prior to that date, time ran only from that date—*G. I. P. Ry. v. Radhey Mal*, 47 All. 549, 23 A.L.J. 398, A.I.R. 1925 All. 656.

31.—Against a carrier One When the goods ought
for compensation year. to be delivered.
for non-delivery of,
or delay in deliver-
ing, goods.

311. Scope of section :—This Article applies not only to a suit brought by the consignee but also to a suit brought by the consignor. It provides for a suit for compensation for non-delivery, i.e. a suit by a person who by reason of non-delivery has sustained loss. There may be cases in which it is not the consignee who sustains loss but the consignor. In such cases it would be a suit by the consignor for compensation for non-delivery. Thus, where the consignor (who had purchased a quantity of salt from the Salt Superintendent at Sambhar) despatched at Ramnagar station certain empty gunny bags through the railway company to be delivered to the Salt Superintendent at Sambhar who was to send back the bags filled with the salt to the consignor, but the bags were not delivered, it was held that in this case it was the consignor who would suffer loss by reason of non-delivery as he would not get the salt, and he would be the person to sue under Article 31. The consignee had nothing to do with the bags and would suffer nothing for non-delivery—*Mutsaddi Lal v. B. B. & C. I. Ry. Co.*, 42 All. 390 (393), *Chiranjilal v. B. N. Ry. Co.*, 52 Cal. 372, 29 C.W.N. 277, A.I.R. 1925 Cal. 559. In *Radha Shyam v. Secretary of State*, 44 Cal. 16 (26), 20 C.W.N. 790, Chatterjee J. has laid down the narrow proposition that Article 31 seems to contemplate a suit by the party who is entitled to the delivery, namely the consignee, and does not apply to a suit by the consignor.

312. Non-delivery :—A suit against a carrier for compensation in respect of goods not delivered is governed by this Article and not by

Art. 115—*I. G. N. Ry. Co. Ltd. v. Nanda*, 13 C W N 851; *Mutsaddi Lal v. B. B. & C. I. Ry. Co.*, 42 All 390; *Ali Mahmad v. G. I. P. Ry. Co.*, 11 N L R 174, 31 I. C. 474; *Moti Ram v. E. I. Ry. Co.*, 2 P. L. R. 1907, 108 P. R. 1906, *G. I. P. Ry. Co. v. Ganpat Rai*, 33 All. 544; *Haji Ajam v. Bombay & Persia S. N. Co.*, 26 Bom 562 (570), *Venkata Subba v. A. S. N. Co.*, 39 Mad. 1, *E. I. Ry. Co. v. Sagar Mull*, 4 Pat. 482, 6 P. L. T. 559, A. I. R. 1925 Pat. 611; *B. N. Ry. Co. v. Hamir Mull*, 5 Pat. 106, A. I. R. 1925 Pat. 727, 90 I. C. 374

The word "non-delivery" was introduced into the Act of 1877 by the Amendment Act X of 1899. Previous to 1899, a suit for compensation for non-delivery of goods was treated as a suit for compensation for breach of an implied contract to deliver and was governed by the three years' rule of limitation under Art. 115—*Mohan v. Henry Conder*, 7 Bom. 478; *G. I. P. Ry. Co. v. Raisett*, 19 Bom 165, *Hassaji v. E. I. Ry. Co.*, 5 Mad. 388, *Danmull v. B. I. S. N. Co.*, 12 Cal 477. These decisions are no longer of any authority. See Note 309 in Article 30 under heading "Suits based on contract." It has been pointed out in that Note that it is now settled law that a suit against a carrier for compensation for non-delivery of goods is governed by Article 31, whether the suit is laid in contract on ground of non-delivery, or in tort, therefore this Article applies to a suit for compensation for non-delivery, where the suit is grounded on tort, viz. where in addition to non-delivery the plaintiff alleges that the railway company has wrongfully converted the goods. The suit would not be governed by Art. 48, because Article 31 is more specific than Art. 48—*Secretary of State v. Dunlop Rubber Co.*, 6 Lah 301, 26 P. L. R. 490, A. I. R. 1925 Lah 478, 88 I. C. 974

Where goods sent through a Railway Company were not taken delivery of by the consignee, and were not sent back to the consignee owing to defect in his address, and were therefore sold by the Company as unclaimed goods under sec. 56 of the Railways Act, a suit by the consignor to recover the sale-proceeds is not a suit for compensation for non-delivery under this Article but is governed by Art. 62—*Tara Chand v. M. & S. M. Ry. Co.*, 44 Mad 823, A. I. R. 1921 Mad 362

Short delivery amounts to non-delivery of the things short delivered, and therefore falls under Article 31. See *Haji Ajam v. Bombay & Persia S. N. Co.*, 26 Bom 562, and *Venkatashubba Rao v. A. S. N. Co.*, 39 Mad. 1. The Patna High Court holds that short delivery means loss of the portion of the consignment undelivered and falls under Article 30—*Rameswar Dass v. E. I. Ry. Co.*, 4 P. L. T. 331, A. I. R. 1923 Pat 298

312A. Starting point of limitation—As to the starting point of limitation under Article 31, the burden lies on the carrier-defendant to shew when the goods ought to have been delivered—*Rudha Shyam v. Secretary of State*, 44 Cal 16 (26). This Article, which lays down the starting point to be the time when the goods ought to have been delivered, cannot apply to a case where it is impossible to show or prove as to when the goods ought to have been delivered—*Id.* Where on the date on which the consignee went to the railway station

to take delivery of the goods the station master refused to give delivery, the period of limitation for a suit under this Article ran from that date as being the date on which the railway company ought to have delivered but failed to deliver the goods—*G. I. P. Ry. v. Radhey Mal*, 47 All. 549, 23 A.L.J. 398, A.I.R. 1925 All 656. Time runs from the date on which the goods ought to be delivered, and the question as to when the recovery of the plaintiff's goods became hopeless is immaterial—*Secretary of State v. Dunlop Rubber Co.*, 6 Lah. 301, A.I.R. 1925 Lah. 478, 88 I.C. 974. Where the plaintiff made over certain goods to the Railway Company in August 1918, but the goods not having arrived at their destination, there was continuous correspondence between the parties up to February 1920, and the plaintiff was being assured that the matter was being inquired into, and ultimately he instituted a suit in March 1920, held that since the plaintiff had all along been assured that inquiry was being made and he had even hopes of getting delivery of the goods within one year of the suit, it cannot be said that his claim was filed more than a year after the date when the goods ought to have been delivered. There is no inflexible rule that time must begin to run from the expiry of the ordinary period of transit—*Jugal Kishore v. G. I. P. Ry.*, 45 All 43 (46), 20 A.L.J. 792, 68 I.C. 981. In a suit falling under this Article, where no portion of the consignment has been delivered, it is sometimes necessary to take evidence on the question as to when the consignment ought to have been delivered, which must in any case be regarded as a question of fact, but where a greater part of a consignment has been delivered on a certain day, there is ordinarily no necessity to enter into evidence on the question as to when the balance of the consignment ought to have been delivered, because the time when the consignment of a whole ought to have been delivered is manifestly the time when the greater part of the consignment arrived at its destination—*Gopi Ram v. G. I. P. Ry. Co.*, 8 P.L.T. 767, 103 I.C. 383, A.I.R. 1927 Pat 335. Where the consignee, to whom 4 packages had been consigned, found on inspecting the consignment that although three of the packages were a portion of the consignment as consigned, the fourth was not a portion of the consignment, and he refused to take ordinary delivery and demanded open delivery, whereupon the Railway Company permitted him open delivery on a subsequent date, but on opening the consignment he found that the goods therein contained were not the goods which had been consigned to him, and instituted a suit against the Railway Company for damages, held that time began to run when the Railway permitted open delivery of the package in question, and not from the date when he had taken delivery of the other three packages—*Bala Prasad v. B. & N. W. Ry.*, 3 Luck. 102, 106 I.C. 311, A.I.R. 1927 Oudh 478 (480).

Misdelivery —See Note 310 in Article 30 under heading "Loss."

Part V.—Two years.

- 32.—Against one who Two When the perversion
 having a right to use years. first becomes known
 property for specific to the person injured
 purposes perverts it thereby.
 to other purposes.

313. Suits under this Article—This Article should not be restricted to a suit for *compensation*. This article is independent of the nature of the remedy, and applies equally to all classes of suits brought upon the cause of action referred to in this Article—*Soman Gope v Raghubir*, 24 Cal. 160 (162). Thus, from the undernoted cases it will be evident that this Article applies to suits for *injunction, ejectment, etc.*

A suit by a Zemindar for removal of certain structures erected by the mortgagees of an occupancy-holding, upon the holding, without the Zemindar's consent, is governed by this Article, as the defendants are persons who have a right to use the land of the plaintiff for certain specified purposes, and they have perverted it to other purposes—*Lach Ram v. Jangi Rai*, 8 A.L.J. 914, 12 I.C. 108. A suit by a Zemindar against certain occupancy tenants who have converted arable land into a grove or wood by planting trees thereon, for an injunction directing them to remove the trees is governed by this Article—*Gangadhar v. Zahurriya*, 8 All. 446; *Jaikishen v Ram Lall*, 20 All. 519. But where trees were planted upon the waste lands of the village by certain trespassers, a suit for removal of the trees would be governed by Article 120 and not by this Article, because the trespassers were not "persons having a right to use property for specific purposes" within the meaning of this Article—*Musharaf Ali v Iftikhar Husain*, 10 All. 634 (635). If the suit against the trespasser is one for removal of the trees and for possession, Art. 144 applies—*Muhammad Shaif v. Bindeswari*, 46 All. 52, 75 I.C. 266, A.I.R. 1924 All. 443.

A suit instituted under sec. 155 of the Bengal Tenancy Act to eject a tenant who had allowed a portion of his holding to be encroached upon by a stranger and had exchanged another plot of land of the tenancy in contravention of the terms of the *kabuliyat*, is governed by this Article and not by Article 143—*Taher v Tarafdi*, 20 C.W.N. 661, 33 I.C. 923. Where the defendant, who had by virtue of a right of easement formerly placed a number of beams on the plaintiff's wall and constructed a thatched roof on them, subsequently placed on the wall heavier and more numerous beams and built a masonry roof on them, a suit by the plaintiff for removal of the beams does not fall under this Article. There is no perversion of use in this case, the use remains the same, namely placing beams on the wall; but the defendants have carried out the purpose in a different way by placing heavier and more numerous beams. Article 32 does not apply, but

probably Art. 120—*Mohan v. Bishambhar*, 46 All. 68, 78 I.C. 193, A.I.R. 1924 All. 450 reversing *Bishambar v. Janki*, A.I.R. 1922 All. 320, 69 I.C. 819

This Article applies to a suit brought under secs. 25 (a) and 155 of the Bengal Tenancy Act for the ejectment of a tenant and for removal of trees planted by him on land leased out for agricultural purposes. Art. 120 does not apply to such a case—*Soman v. Raghubir*, 24 Cal. 160. A suit against a tenant for mandatory injunction to fill up a tank excavated by the tenant on land leased out for agricultural purposes, and in the alternative for ejectment, falls under this Article, and not under Art. 120—*Sharoop v. Joggesur*, 26 Cal. 564 (F.B.) practically overruling *Kedarnath v. Khetterpaul*, 6 Cal. 34 and disapproving *Gonesh v. Gondour*, 9 Cal. 147. So also, a suit for ejectment as well as for compensation against a tenant who has broken the conditions of the lease by making excavation on agricultural land, is governed by this Article—*Krishna Das v. Mohendra*, 25 C.W.N. 930, 62 I.C. 779, A.I.R. 1921 Cal. 62.

Appropriation of common property—Where the defendant, who in common with the public had a right to bury his dead in a public graveyard, appropriated it to his own use by planting trees thereon, and the proprietor of the land sued for removal of the trees, held that the suit was governed by Article 32. It was contended that Art. 32 could not apply until and unless some particular person (and not the public generally) was in possession of the property and that property had been given to him for a specific purpose. This contention was overruled—*Ismail v. Thakur Lal*, 13 O.L.J. 428, A.I.R. 1926 Oudh 341, 93 I.C. 89. Where a property (e.g. a village pond) was reserved for the common use of all the owners of the village, but the defendant took possession of the property and appropriated it to his own use, it has been held in some cases that a suit for an injunction restraining the defendant from cultivating the land is governed by this Article, in as much as the defendant has perverted the property to purposes other than those for which it was intended; this Article is not restricted to the case of a defendant who was, before the encroachment, in actual and exclusive possession of the property for a specific purpose and subsequently perverts it to other purposes—*Ghulam Md. v. Abdul Satar*, 89 I.C. 405, A.I.R. 1925 Lah. 653; *Bhagwana v. Bhagwana*, 31 P.L.R. 14, A.I.R. 1930 Lah. 283 (284). A person, who in common with other persons, has a right to use a public property (e.g. a public pathway) may be said to be a person having a right to use property for specific purposes; and if he builds on the land, a suit for removal of the building is governed by this Article—*Dewa Singh v. Qarum*, 30 P.L.R. 399, A.I.R. 1929 Lah. 535, 118 I.C. 447; *Bhagwan v. Ramanand*, 115 I.C. 73. But in more recent cases of the same High Court it has been held that a person who has a right to use a property (e.g. a public thoroughfare) in common with the general public cannot be said to be a "person having a right to use property for specific purposes." This expression applies to persons who have a specific right of some kind peculiar to themselves. If persons

having only a right to use a public road in common with others appropriate the road to themselves by erecting huts etc. on it, a suit for removal of the obstruction falls under Article 120 and not under Article 32—*Mian Pirthi v. Hans Raj*, A.I.R. 1928 Lah. 794 (795), 112 I.C. 381; *Gurdit Singh v. Hari Singh*, 29 P.L.R. 308, A.I.R. 1928 Lah. 792, 110 I.C. 517; *Achar Singh v. Badhawa*, 2 P.L.R. 1913, 124 P.R. 1912, 15 I.C. 285 (286). The word "property" means property of a particular person or persons. A right to use a public road is not a right to use property for specific purposes—*Gurdit Singh v. Hari Singh*, supra. But where before the perversion the defendants had a real right in the land itself, parts of which any of them could from time to time temporarily appropriate and use (e.g. to cremate a dead body), a suit against the defendants for building on the ground is governed by this Article—*Nand Ram v. Jaichand*, A.I.R. 1929 Lah. 186 (187), 112 I.C. 844 (following 13 O.L.J. 428 supra and distinguishing A.I.R. 1928 Lah. 792 and 794 supra).

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|---|------------|---------------------------------------|
| 33.—Under the Legal Representatives' Suits Act, XII of 1855, against an executor. | Two years. | When the wrong complained of is done. |
| 34.—Under the same Act against an administrator. | Two years. | When the wrong complained of is done. |
| 35.—Under the same Act against any other representative. | Two years. | When the wrong complained of is done. |

314. The Legal Representatives' Suits Act permits the executors, administrators of the deceased, etc., to be sued for any wrong committed by him in his lifetime for which he would have been subject to an action, provided such wrong is committed within a year before his death.

Articles 33—35 provide for suits against executors, etc., whereas Article 20 provides for suits by executors, etc.

[Arts. 33—35 of the present Act correspond to Art. 33 of Act XV of 1877. Arts. 34 and 35 of the old Act have been omitted for reasons stated in the notes below; and to preserve the numbering of the old Act, Art. 33 has been split up into three Articles.

Arts. 34 and 35 of Act XV of 1877 ran thus :—

- | | | |
|---|------------|--|
| 34.—For the recovery of a wife. | Two years. | When possession is demanded and refused |
| 35.—For the restitution of conjugal rights. | Two years. | When restitution is demanded and is refused by the husband or wife, being of full age, and sound mind. |

315. Under the Act of 1877, there was a conflict of opinion as to the applicability of these Articles and as to the application of sec. 23 to the suits contemplated by these Articles.

Thus, where a suit for recovery of wife was brought by the husband against a person who detained the wife, it was held in one case that the cause of action arose when the husband demanded possession of his wife and was refused, and section 23 did not apply. The suit was barred unless brought within 2 years after demand—*Ghizni v. Mehram*, 60 P.R. 1879. In another case it was held, however, that a third person who harbours a run-away wife does a continuing wrong, and in a suit by the husband against such person for the recovery of his wife a fresh period of limitation runs at every moment of the time during which the wrong continues, under sec. 23—*Khairuddin v. Budhi*, 80 P.R. 1892

So also, in respect of suits under Article 35, it was held in some cases that the refusal of a wife to return to her husband and to allow him the exercise of conjugal rights was a continuing wrong giving rise to constantly recurring causes of action, so that the suit though governed by Article 35 was not excluded from the operation of section 23. The suit was therefore practically exempt from limitation—*Bai Sari v. Sankla*, 16 Bom 714; *Hem Chand v. Shiva*, 16 Bom 715 (Note); *Ghizni v. Mehram*, 60 P.R. 1879. In an Allahabad case it was held that since the personal law of Hindus and Mahomedans did not require an antecedent demand in a suit for restitution of conjugal rights, Article 35 was inapplicable to such a suit; but Article 120 would apply as read with section 23, and the suit was practically never barred—*Binda v. Kaunsilla*, 13 All. 126. In several other cases it was laid down that if a demand and refusal were in fact made, the suit would be governed by Article 35 and would be barred if brought more than two years after demand, notwithstanding the provisions of section 23—*Dhanjibhoy v. Hirabai*, 25 Bom. 644 (F.B.); *Saravanai v. Poovayi*, 28 Mad. 436; *Astrunnessa v. Buzloo Meah*, 34 All. 79. In *Fakirgauda v. Gangi*, 23 Bom. 307 the Judges were in doubt as to whether section 23 would apply.

To avoid this conflict of decisions the Legislature has omitted those Articles from the present Act, so that the suits contemplated by those Articles are now altogether exempt from the bar of limitation

But when a right to restitution has already been barred under the Act of 1877, it cannot be revived by reason of the fact that it is saved from the bar of limitation by the present Act—*Muhammad v. Sakina*, 37 Bom. 303. The Allahabad High Court holds on the contrary that in the absence of a provision in the present Act to the effect that "nothing herein contained shall be deemed to revive any right to sue barred under the old Act" the plaintiff's remedy though barred under the old act subsists under the new Act of 1908—*Ayesha v. Fayaz*, 34 All. 412. This view, it is submitted, is incorrect. The provision 'nothing herein..... Act' has not been reproduced in the present Act for the obvious reason that a similar provision exists in sec. 6 of the General Clauses Act of 1897. See notes at p. 6 ante.]

36.—For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for. Two years. When the malfeasance, mis-feasance or non-feasance takes place.

316. Malfeasance, misfeasance and nonfeasance:—

These words are equivalent to, and have the same significance as, the word 'tort.' They have the widest import and embrace all possible acts or omissions commonly known as 'torts' by English lawyers—*Esso v. Steam Ship "Savitri,"* 11 Bom 133 (135). These terms are generally applied to some wrongful acts committed by persons standing in a fiduciary or quasi-fiduciary character, such as executors, trustees and directors of companies—per Maclean C. J. in *Mangun v. Dolhin*, 25 Cal. 692 (699).

317. Suits not under this Article:—Art 36 is a general or residuary Article governing suits for compensation for torts to which no special Article applies,—*Esso v. Steam Ship "Savitri,"* 11 Bom 133; *Mangun v. Dolhin*, 25 Cal. 692; *Jadu Nath v. Hari Kar*, 36 Cal. 141; *Surat v. Umar*, 22 Cal. 877; *Ram Narain v. Umrao*, 29 All. 615; *Veeramma v. Subba Rao*, 35 I.C. 98 (102), 31 M.L.J. 257, *Panna Lal v. Adja Coal Co Ltd.*, 31 C.W.N. 82 (95). Thus, a suit for compensation for wrongful attachment of moveable property before judgment is a suit for compensation for "wrongful seizure under legal process" under the specific Article 29, rather than a suit under Article 36—*Ram Narain v. Umrao Singh*, 29 All. 615 (617). The judgment-creditors' act of attaching the property of their judgment-debtor and asking the Court to distribute the sale proceeds among them, or their act of withdrawal of this money under the orders of the Court, cannot be regarded as "misfeasance" or malfeasance within the meaning of the section—*Ram Narain v. Brij Banke*, 39 All. 322 (330).

Where the malfeasance etc amounts to a trespass upon land, this article would not apply, but Article 39 which is more specific—*Narasimmacharya v. Raghupathia*, 6 Mad. 176. Plaintiff mortgaged his house to defendants who sold the same by a power contained in the deed, and possession was given to the purchaser. Some timber (which was not mortgaged) was stored in the house, and was not returned or accounted for to the plaintiff, for which he brought the present suit, alleging that the defendants had converted it to their use. Held that the plaintiff could recover the timber or its value, and the suit for such recovery was governed by the more specific Article 49 than by this Article, as the suit is for recovery of the specific moveable property or for compensation for wrongfully taking the same—*Passanha v. Madras Deposit and Benefit Society*, 11 Mad. 333. A suit for compensation for the wrongful seizure of a ship under an order of Court is governed by the more specific Article 29, rather than by this Article—*Madras Steam*

Navigation Co. Ltd. v. Shalimar Works Ltd., 42 Cal. 85 (108). Where the compensation-money awarded by Government for land acquired by them had been withdrawn by a tenant representing himself to be the owner, and a suit was subsequently brought by the landlord against the tenant for the recovery of his share of the compensation money, *held* that the suit came more properly under Article 62 or 120 than under this Article—*Khetter Kristo v. Dinendra*, 3 C.W.N. 202.

This Article applies to *tortious* acts independent of *contract*. If the suit for damages for malfeasance or misfeasance or negligence is based upon a liability *ex contractu* (whether the contracts be express or implied), the proper Article applicable is Article 115 (but not Art. 120)—*Jagannath v. Kalidas*, 8 Pat. 776, A.I.R. 1929 Pat. 245 (247), 10 P.L.T. 191. A suit by an auction-purchaser against the decree-holder for compensation on account of a misdescription of the boundaries of the land in the proclamation of sale is not governed by this Article, in as much as the liability of the decree-holder, if any, is based on the contract of sale—*Mahomed v. Navroji*, 10 Bom. 214 (218). But *quaere* whether a Court-sale can be called a *contract*.

Where the defendant agreed to sell to the plaintiff certain goods of another person on the representation that he (defendant) had authority to sell those goods when in fact he had none, and afterwards failed to sell those goods, a suit by the plaintiff for compensation is not one arising in tort but one connected with a contract and arising out of the incidents of a contract. The suit is governed by Article 115 and not by this Article—*Vairavan v. Avicha*, 38 Mad 275 (277). Where some of the joint tenants of certain lands took the use and occupation of part of the joint lands to the exclusion of the other joint tenants, a suit by the latter for compensation for such use and occupation by the former was governed by Article 120; Article 36 could not apply, for when the defendants, being tenants in common with the plaintiffs, exclusively occupied a portion of *ijmali* lands, they could not be regarded as doing any act of misfeasance, malfeasance or nonfeasance within the meaning of this Article—*Robert Watson & Co. v. Ram Chand*, 23 Cal. 799 (804).

An application under sec. 214 of the old Indian Companies Act 1882 (sec. 235 of the Companies Act, 1913) by an official liquidator praying that the directors of the company in liquidation be ordered to pay over to him a sum of money which had been improperly distributed among the shareholders, was not a *suit*, and therefore this or any other Article in the first division of this Schedule could not apply to it—*Ramasami v. Sreeramulu*, 19 Mad. 149. In another case it was held that a proceeding under sec. 214 of the Companies Act (1882) was not subject to the limitation provided by Article 36, as such proceeding was not a suit—*Connell v. Himalaya Bank*, 18 All. 12 (15). But sec. 235 (3) of the Indian Companies Act of 1913 expressly lays down that an application under sec. 235 of that Act is to be treated as a suit for the purposes of the Limitation Act. The question is as to which Article of the Limitation

Act is applicable. The Lahore High Court holds that this application is governed by Article 36—*Bank of Mullan Ld. v. Hukum Chand*, 71 I.C. 890, A.I.R. 1923 Lah. 58; *Daulat Ram v. Bharat National Bank*, 5 Lah. 27 (30), A.I.R. 1924 Lah. 435, 79 I.C. 740; *Bhim Singh v. Basheshar*, 8 Lah. 167, 100 I.C. 907, A.I.R. 1927 Lah. 433. But the Allahabad High Court is of opinion that Article 36 cannot apply, because the liability of the directors is not a matter independent of contract, the directors are not men in the street or trespassers, but they are bound by the Articles of Association, which contain the contract between the company and the directors. Moreover, if Article 36 were to apply, a fraudulent director has only to keep the shareholders and others in ignorance of his mischievous acts for two years and he would then be immune. Article 120 applies to the case—*In re Union Bank*, 47 All. 699, 23 A.L.J. 473, 88 I.C. 785, A.I.R. 1925 All. 579. The Bombay High Court is also of opinion that the relation between a bank and its directors are in part governed by numerous clauses in the Articles of Association which constitute part, though not the whole, of the contract between the bank and its directors. A claim against the directors for breach of trust is clearly not independent of contract—*Govind v. Rangnath*, 54 Bom. 226, 32 Bom. L.R. 232. Article 120 governs the suit—*Ibid*.

318. Suits under this Article.—A suit by the plaintiff to recover damages for the loss of his ship caused by collision with the defendant's steamer is an action on tort founded upon the negligence of the defendant or his servants in the management of his steamer, and must be brought within two years under this Article—*Essoo v. Steam Ship "Savitri"*, 11 Bom. 133 (138). During the tenure of office of the Chairman of a Municipal Council the manager embezzled sums of money. The Council sued the Chairman to recover the amount, on the ground that the Chairman, as the agent appointed by the Municipality was bound to collect the dues and see that proper accounts were kept, and that he was liable to pay the loss which had occurred by the said embezzlement; it was held that the relation of principal and agent did not exist, that Arts. 89 and 90 did not therefore apply, and that the case was governed by Art. 36—*Srinivasa v. Municipal Council of Karur*, 22 Mad. 342. A suit brought by the son of a deceased *shebait* of a *debutter* estate, for the recovery of money advanced by the deceased on account of the debutter estate at a time when he had been wrongfully kept out of office by the defendant, who had claimed the office as against the deceased and realised money out of the estate, was held to be governed by this Article, if the suit was brought against the defendant *personally*, but if it was against the defendant as representing the debutter estate, it would be governed by Art. 120—*Peary Mohan v. Narendra*, 5 C.W.N. 273. A suit for damages for wrongful attachment of moveable property before judgment falls under Article 29, but if the attachment is not wrongful, the suit may fall under Article 36—*Manavikraman v. Avisilan*, 19 Mad. 80 (82). See this case cited in Note 306 under Art. 29. A suit for compensation for injury done to plaintiff's stock-in-trade caused by persons who made the attachment before judgment treading on it, falls under this Article—*Sokkalinga v.*

Krishnaswami, 38 M.L.J. 324, 55 I.C. 786 (790). Where the Collector of customs detained the plaintiff's goods on representation made by the defendant company maliciously and without reasonable and probable cause, a suit for damages for such detention against defendant is governed by Article 36. Article 49 cannot apply because the defendant company never had possession of or control over the goods and the Collector cannot be looked upon as the defendant company's agent—*Albert Bonnan v. Imperial Tobacco Co.*, 30 C.W.N. 465, A.I.R. 1928 Cal. 757, 94 I.C. 444; *Imperial Tobacco Co. v. A. Bonnan*, 46 C.L.J. 455, A.I.R. 1928 Cal. 1, 106 I.C. 277. A suit by a temple servant who has been suspended from service for compensation for the loss of perquisites during the period of suspension, is governed by this Article—*Bharadwaj v. Arunachala*, 41 Mad. 528.

319. Attachment and removal of crops :—A suit for damages for wrongful attachment, cutting and carrying away of plaintiff's crops is governed by either Article 48 or 49, and not by Art. 36 which is a general Article in respect of suits on torts.—*Jadu Nath v. Hari Kar*, 17 C.W.N. 308 (311), reversing *Jadunath v. Hari Kar*, 36 Cal. 141 (—*Sripali v. Hari Kar*, 12 C.W.N. 1090). A suit for damages for wrongful distraint of standing crops is governed by Article 36, and not by Art. 29, because standing crops are not moveable property within the meaning of the latter Article—*Hari Charan v. Hari Kar*, 32 Cal. 459 (462)—*Mohesh Chandra v. Hari Kar*, 9 C.W.N. 376. But the Madras High Court is of opinion that a suit for damages for wrongful distraint of plaintiff's standing crops is really a suit for compensation for trespass upon the plaintiff's land, and falls under the specific Article 39, and the general Article 36 does not apply—*Venkataramanujam v. Basavayya*, 25 M.L.J. 447, 21 I.C. 213 (215, 216).

320. Wrongful removal of crops without attachment :—A suit for cutting and carrying away crops without any process of attachment falls under the specific Article 48 and not under Article 36, which is a general Article for torts—*Surat Lal v. Umar*, 22 Cal. 877 (882). In the Calcutta Full Bench case of *Mangun v. Dolhin*, 25 Cal. 692 (699, 700) also, the majority were in favour of the application of Article 48 or 49, and decided against the application of Article 36. This decision practically overrules *Pandah v. Jennuddi*, 4 Cal. 665.

321. Cutting away trees :—Where land with trees planted thereon was hypothecated, and afterwards the mortgagors sold the trees to the defendants, who cut and carried away the trees, a suit instituted by the mortgagees against the defendants for compensation for cutting and carrying away the trees and thereby impairing the value of the security is governed by Art. 36 or 49—*Muniappa v. Seshayya*, 3 L.W. 341, 32 I.C. 901. A suit by the mortgagor against the mortgagee (usufructuary) for damages in respect of certain trees wrongfully cut by the mortgagee during the time he was in possession of the mortgaged property, is governed by this Article—*Sivachidambara v. Kamatchi*, 33 Mad. 71. The Calcutta High Court holds that a suit by a landlord for

compensation for the removal of trees cut down by a tenant is not governed by Art. 36 but by Art. 48 or 49—*Mahomed Hamidar v. Ali Fakir*, 10 C.L.J. 25, 2 I.C. 955. For a case in which a suit for entering on the plaintiff's land and cutting away trees was held to be a suit for compensation for trespass upon immoveable property, see 20 N.L.R. 80 cited under Art. 39.

322. Starting point of limitation:—The time from which limitation begins to run is the date of the alleged misfeasance or malfeasance, and not the date when the plaintiff comes to know of the misfeasance. The knowledge of the plaintiff has nothing to do with the question—*Sivachidambura v. Kamatchi*, 33 Mad 71 (74).

In a suit for compensation governed by Art. 36, section 23 would be applicable if there is a continuance of the injury caused by the defendant. Limitation will run when the injury ceases—*Surajmal v. Maneksha*, 6 Bom. L.R. 704. In this case the misfeasance complained of was the issue of a prohibitory order which was allowed to continue in force for five years. See also *Manga v. Changa Mal*, 22 A.L.J. 977, A.I.R. 1925 All 131. If the suit for compensation for malfeasance arises out of some specific injury, sec. 24 will apply, and limitation will run from the date when the injury results—*Jagannath v. Kalidas*, 8 Pat 776, 10 P.L.T. 191, A.I.R. 1929 Pat. 245 (246).

Part VI.—Three years.

37.—For compensation Three The date of the obstruction for obstructing a years. tion.
way or a water-course.

323. An obstruction to a watercourse being a continuous act of wrong, as to which the cause of action is renewed *de die in diem*, section 23 applies; and a suit brought after three years from the date of the obstruction would not be barred—*Rajrup v. Abdul*, 6 Cal 394 (P.C.). Where the obstruction caused by closing the main sluice of a tank continued and the plaintiff was prevented from removing the same by threat of violence, it was a continuing wrong under this Article read with sec. 23, and the suit was in time if brought within three years of the last day to which the wrong continued—*Sona Patil v. Laxman*, 82 I.C. 482, A.I.R. 1925 Nag 189.

38.—For compensation Three The date of the diversion for diverting a years. sion.
watercourse.

39.—For compensation Three The date of the trespass for trespass upon years. pass.
immoveable property.

324. This Article has reference only to suits for damages on account of trespass, and not to suits to recover immoveable property from a trespasser, for which the period of limitation is 12 years under Article 142—*Joharmal v. Municipality of Ahmednagar*, 6 Bom. 580 (582).

'Trespass' includes the mischief which the trespasser commits after entering on the land. Therefore a suit for damages for unlawfully setting fire to and destroying pepper vines on the plaintiff's land is governed by this Article—*Moideen v. Koman Nair*, 23 M.L.J. 618, 17 I.C. 605. Where the defendants trespassed upon the land of the plaintiff and in the course of the trespass he cut plaintiff's valuable lac-producing trees on the land, and removed the same, and thus caused damage to him, and the plaintiff brought a suit for damages sustained for wrongfully cutting the lac-producing trees and for removing the trees, held that the suit was one for compensation for trespass upon immoveable property within the meaning of this Article, and not a suit under Article 36. The suit is one for damages sustained on account of the lac crops of which the plaintiff was deprived by reason of the defendant's illegal act of trespass in cutting down the trees and in removing them. If the trees had not been cut but only the lac crop had been enjoyed by the defendant, plaintiff's claim would have been governed by Article 109. If the claim had been purely for compensation for removal of trees cut, the case would have fallen under Article 48 or 49. What the plaintiff complains of is not merely the removal of the trees, but also the cutting itself as having involved the infringement of his right, and he claims compensation with reference to such infringement; as this infringement has been made by a trespasser, Article 39 applies to the suit as a whole—*Narbada Prasad v. Akbar Khan*, 20 N.L.R. 80, 80 I.C. 769, A.I.R. 1924 Nag. 125. The plaintiff and defendants were lessees of contiguous coal lands. The plaintiffs sued the defendants for damages (including the value of coal) alleging that the latter had trespassed into the plaintiff's underground land, and extracted a large quantity of coal therefrom. Held that the suit fell under this Article or Article 49, and time ran from the last act of trespass. The claim is very much like a claim for damages for crops cut and carried away from the plaintiff's land, and to such a claim Article 39 or 49 has been held to be applicable—*Panna Lal v. Adjai Coal Co. Ltd.*, 31 C.W.N. 82 (95), 101 I.C. 62, A.I.R. 1927 Cal. 117. But the Privy Council holds that Article 48 is more applicable—34 C.W.N. 483. If the suit is only for compensation for underground trespass upon the plaintiff's colliery, it is governed by Article 39 only; if the suit is only to recover the price of coal extracted and removed by the defendant from the plaintiff's colliery, and converted to his use, the suit falls under Article 48—*Lodna Colliery Co., Ltd. v. Bepin Behary*, 1 P.L.T. 84, 55 I.C. 113 (133, 134). Where the defendant enters on the plaintiff's land and receives the profits, a suit by the plaintiff for such mesne profits received by the defendant is governed by Article 109; but if the defendant does not actually receive any profits and the land remains waste, a suit by the plaintiff for mesne profits (i.e., the profits which he might have received from the land) is a suit for damages for

trespass, and falls under this Article (not under Article 109)—*Ramasami v. Authi Lakshmi Ammal*, 34 Mad. 502 (dissenting from *Abbas v. Fassuhuddin*, 24 Cal. 413).

A trespass is a continuing wrong, continuing from its inception until the possession of the trespasser comes to an end: therefore a suit may be brought within 3 years from the date on which the defendant's possession ceased, and compensation may be claimed for damages suffered within three years preceding the suit—*Narasimmacharya v. Raghu-pathacharya*, 6 Mad. 176. The cause of action in a suit to have a drain closed on the ground that it passed through plaintiff's land, was held to count from the last act of trespass, each act of trespass causing a fresh right of action—*Ramphul v. Misree*, 24 W R. 87.

Removal of crops.—A suit for damages for cutting and carrying away crops may fall under this Article, because the act of cutting and carrying away of the crops is coupled with the act of trespass on plaintiff's land, and clearly he is entitled to recover damages for trespass. But the case would fall more properly under Article 48 or 49—*Mangun v. Dolhin*, 25 Cal. 692 (699, 700); *Surat Lal v. Umar*, 22 Cal. 877 (885); *Jadu Nath v. Hari Kar*, 36 Cal. 141 (145, 147) (per Doss J.)

Wrongful attachment of crops.—The Madras High Court and the Nagpur Court are of opinion that standing crops being immoveable property for the purpose of the Limitation Act, a suit for illegal attachment of standing crops is a suit for trespass upon immoveable property, and is governed by Article 39 which specifically provides for suits for compensation for such trespass, and not by the general Article 36 which provides for suits for compensation for torts not provided for elsewhere—*Venkataramanujam v. Basavayya*, 25 M L J. 447, 21 I C. 213 (216); *Nagoba v. Madholala*, 4 N L R 49, *Suraj Mal v. Prolhad*, 18 N L R. 96, A.I.R. 1922 Nag 212 (213). But the Calcutta High Court holds that such a suit is governed by Article 36—*Hari Charan v. Hari Kar*, 32 Cal. 459 (462) · *Mohesh Chandra v. Hari Kar*, 9 C.W N. 376

40.—For compensation Three The date of the in-
for infringing copy- years. fringement.
right or any other
exclusive privilege.

325. This Article applies to a suit for an account of profits obtained by the infringement of an exclusive privilege—*Kinmond v Jackson*, 3 Cal. 17 The right to a trade-name or trade-mark is an exclusive privilege and a suit for damages for infringing the privilege is governed by this Article—*Vercados v. Macleod*, 45 P R 1919, 51 I C 434

41.—To restrain waste. Three When the waste begins.
years.

326. A suit by the reversioner not only to restrain the waste of moveable property by the widow but also praying that the property be handed over to a receiver appointed for such purpose and that the donees.

from the widow be directed to replace any part of the property which can be traced in their hands falls under Article 120—*Venkanna v. Narasimham*, 44 Mad. 984. The words “when the waste begins” in the third column indicate that an act of waste is not a continuing wrong within the meaning of section 23.

**42.—For compensation Three When the injunction
for injury caused by years. ceases.
an injunction wrong-
fully obtained.**

327. In *Mohini Mohan v. Surendra*, 42 Cal. 550 (at. p. 556) Fletcher J. expressed doubt as to whether a suit contemplated by this section was at all maintainable, and disapproved of the ruling in *Nand Coomar v. Gour Sunkar*, 13 W.R. 305, in which such suit was held to be maintainable. See also *Narendra v. Bhushan Chandra*, 31 C.L.J. 495, 57 I.C. 375. In a recent Calcutta case also, it has been held that the existence of Article 42 of the Limitation Act is in itself no argument that a suit is maintainable for damages for an injury caused by an injunction wrongfully obtained, because an Act cannot create a cause of action if it does not already exist independently—*Albert Bonnan v. Imperial Tobacco Co.*, 30 C.W.N. 465, 94 I.C. 444, A.I.R. 1926 Cal. 757 (761). In *Bhutnath v. Chandra Binode*, 16 C.L.J. 34, 16 I.C. 443, a suit for damages for an injunction was held to be maintainable. See sec 95 of the C. P. Code 1908 which provides for an application to recover compensation for injunction.

The defendant judgment-creditor attached certain property of his judgment-debtor; the plaintiff intervened and claimed the property as his own. The defendant applied for and obtained an injunction directing that the property should not be made over to the plaintiff. The claim-proceedings terminated in plaintiff's favour, and thereupon the plaintiff sued for loss of a part of the property while it was under the defendant's attachment. It was held that the suit was governed by this Article, and not by Art 29—*Idu v. Rahmat*, 24 All 146; *Haji Pir Muhammad v. Thakur Das*, 40 P.R. 1881. An attachment by a prohibitory under O. 21, r. 46, C. P. Code does not amount to an injunction—*Veeramma v. Subba Rao*, 31 M.L.J. 257, 35 I.C. 98 (101).

Time begins to run as soon as the Injunction is at an end. When an injunction is granted in a suit but the suit is dismissed by the Court of appeal on the 3rd July 1905, and the order of dismissal is affirmed on appeal to the High Court on the 22nd December 1905, the injunction is said to terminate on the 3rd July 1905—*Bhutnath v. Chandra*, 16 C.L.J. 34, 16 I.C. 443. Where a temporary injunction was at first granted in a suit, and the Court afterwards passed a decree granting a perpetual injunction, the period of limitation in respect of a suit for damages for the temporary injunction began to run from the date when the Court passed the decree for perpetual injunction, that being the date when the temporary injunction ceased and was replaced by the

perpetual injunction—*Mohini Mohan v. Surendra*, 42 Cal. 550, 18 C.W.N. 1189.

- 43.—Under the *Indian Succession Act, 1925, section 360 or section 361*, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets. Three years. The date of the payment or distribution.

The words "Indian ...361" have been substituted for "Indian Succession Act, 1865, section 320 or section 321, or under the Probate and Administration Act, 1881, section 139 or section 140," by the Repealing and Amending Act VIII of 1930. This is consequential to the re-enactment in the Indian Succession Act 1925 of the corresponding provisions of the Old Acts.

- 44.—By a ward who has attained majority, to set aside a transfer of property by his guardian. Three years. When the ward attains majority.

328. Change :—This Article corresponds to Art. 44 of Act XV of 1877, the words "transfer of property" being substituted for the word "sale" occurring in the old Act.

The term 'sale' in Art. 44 of the Act of 1877 was held to be not confined to an assignment of absolute ownership only but meant an assignment of the ward's interest, whatever that interest might be. Article 44 was therefore applied to a suit by the ward to set aside an assignment by his guardian of his right as mortgagee—*Madugula Latchiah v. Pally Mukkalunga*, 30 Mad. 393 (395). It was suggested by Dr. Whitley Stokes in his *Anglo-Indian Codes*, Vol. II, page 950 that this Article should be extended to mortgages and leases. As a result of this suggestion, the word 'sale' has now been changed into "transfer of property" in the present Act.

329. Scope of Article —The use of the term "ward" in this Article is peculiar, and there seems no reason why the word "minor" should not have been used. But the use of the term 'ward' does not mean that this Article is restricted to transfers made by guardians appointed or declared under the Guardians and Wards Act; it applies to transfers made by natural guardians as well—*Fakirappa v. Lumanna*, 44 Bom. 742 (761, 763), 22 Bom. L.R. 680, 58 I.C. 257. The definition

of the word "guardian" in sec. 4 (2) Guardians and Wards Act indicates that the word is of general import, and includes natural and testamentary guardians as well as guardians appointed by the Court—*Dip Chand v. Munni*, 27 A.L.J. 1248, A.I.R. 1929 All. 879 (880); *Ramaswami v. Govindammal*, 56 M.L.J. 332, A.I.R. 1929 Mad. 313 (316), 118 I.C. 481.

This Article applies not only to a suit brought by the *minor himself* after attaining majority, but also to a suit by the minor's reversioner after the minor's death, see *Faktrappa v. Lumanna*, 44 Bom. 742.

One condition precedent to the application of this Article is that the property alienated should be the *property of the ward*. Where it is found that the property on the date of the sale was held by a Hindu daughter for her life-time, and her minor son *had no right*, title or interest in the property at that time, a suit brought by the son after his mother's death to set aside the sale is not governed by this Article—*Iqbal v. Bankey*, 7 O.W.N. 150, A.I.R. 1930 Oudh 82 (83). Article 141 would apply.

Where a sale was effected by the minor's father not in his capacity as *guardian* but in his capacity as *executor* under a will (under which the minor was a legatee), *held* that this Article did not apply to a suit to recover the property sold—*Ganapathi v. Sivamalai*, 36 Mad 575. If the *Karnavan* alienates the immoveable property of a *tarwad*, some of whom are minors, and the alienation is made by the *Karnavan* not only as the guardian of the minors but also in his capacity as *Karnavan*, this Article does not apply, and a suit for possession by the minor after attaining majority is governed by Article 144—*Kanna Pannikkar v. Nanchan*, 46 M.L.J. 340, A.I.R. 1924 Mad 607, 78 I.C. 564.

If the ward dies during his minority, a suit by his legal representative for recovering the property alienated by the guardian will not fall under Art. 44; but if the ward dies after the attainment of majority, Art. 44 will apply—*Ramaswami v. Govindammal*, 56 M.L.J. 332, A.I.R. 1929 Mad. 313 (321), 118 I.C. 481.

330. Void transfers :—Where the alienation made by the guardian is an absolute nullity, it is unnecessary for the minor to get it set aside under this Article; he can sue to recover possession within the longer period allowed by Art 144. Thus, an alienation by a *de facto* guardian *i.e.*, a person who is not a lawful guardian and who has no authority to act as guardian (e.g. a mother or step-mother or brother under the Mahomedan law, or a step-mother or paternal aunt under the Hindu law) is void (and not merely voidable) and need not be set aside; this Article does not apply to such a case. The plaintiff can bring a suit to recover possession under Art. 144—*Matadin v. Ahmed Ali*, 34 All. 213 (222, 223) (P.C.), 9 A.L.J. 215; *Balappa v. Chanbasappa*, 17 Bom L.R. 1134, 33 I.C. 444; *Anandappa v. Totappa*, 33 I.C. 441, 17 Bom L.R. 1137 (Foot note); *Laloo Karikar v. Jagat Chandra*, 25 C.W.N. 258; *Thyammal v. Ruffanna*, 38 Mad. 1125; *Krishnadhan v. Brojendra*, 34 C.W.N. 642 (645); *Sheikh Rajah v. Sheikh Wazir*, 1 P.L.J. 168, 34 I.C. 85; *Satrohan v. Inder Bikram*, 10 O.C. 367; *Sadulla v. Sulaiman*,

6 Lah. L.J. 516, 84 I.C. 923; *Ghandu Lal v. Anant Ram*, 135 P.R. 1892; *Sardar Shah v. Haji*, 182 P.L.R. 1908, 1 I.C. 545, 28 P.R. 1909; *Tajjad v. Mahammad Zulfikar*, 83 P.R. 1916, 33 I.C. 943; *Uttam Singh v. Gurmukh Singh*, 15 P.R. 1913, 19 I.C. 235; *Husen v. Rajaram*, 10 N.L.R. 133, 26 I.C. 813; *Vitu v. Debidas*, 15 N.L.R. 55, 51 I.C. 943; *Punjab Rao v. Atmaram*, A.I.R. 1926 Nag 124

Where a sale-deed executed by a guardian in respect of properties in one district was registered in another district by fraudulent inclusion in the deed of a small item of property situated in the latter district which neither the vendor intended to sell nor the purchaser to buy, held that the sale-deed was not duly registered; and the sale being therefore totally inoperative, this Article did not apply but Art 144—*Narasimha Rao v. Papunna*, 43 Mad 436, 38 M.L.J. 227, 56 I.C. 519

In a joint Hindu Mitakshara family, there can be no "guardian of property" of a minor, since the interest of a member of such family is no individual property at all. Consequently an alienation made by a person calling himself such a guardian is not binding on the minor, and no suit is required to be brought by him under this Article to set aside the sale. He can bring a suit for possession under Art. 144—*Kalyan Sing v. Putambar*, 13 A.L.J. 94, 27 I.C. 687; *Asaram v. Ratan Singh*, 12 N.L.R. 12, 32 I.C. 242, *Veerasami v. Sivagurunath*, 21 L.W. 111, A.I.R. 1925 Mad 793; *Appanna Prosada v. Appanna Mahapatra*, 5 L.W. 374, 40 I.C. 145. And so, where several brothers constitute a joint Hindu family, the elder brother is undoubtedly the manager of the family, but he is not the guardian of his minor brothers, because there can be no guardianship in such a case. Even assuming that he was a *de facto* guardian, still this Article cannot apply, as it does not contemplate a *de facto* guardian—*Dnyanu v. Vishnu*, 27 Bom. L.R. 495, 87 I.C. 721, A.I.R. 1925 Bom. 372. A sale-deed executed by the manager of a joint Hindu family for other than necessary purposes is void from its inception, and a suit to set it aside is not governed by Art. 44—*Sheo Raj v. Ajudhiya*, 4 Luck. 503, A.I.R. 1929 Oudh 284, 116 I.C. 195. Where the property of a minor is transferred by a wholly unauthorised person, the transaction is void *ab initio*, and it is not necessary for the minor in order to recover possession, to have the transfer set aside. In such cases Art 144, and not Art 44, applies—*Dipchand v. Munni Lal*, 27 A.L.J. 1248, A.I.R. 1929 All 879 (881). A lease which amounts to a clog on the equity of redemption is void; such a lease, executed by a guardian, need not be set aside by a suit within three years under Art. 44—*Parashram v. Lakshmisbai*, 53 Bom 360, A.I.R. 1929 Bom. 186 (188), 115 I.C. 405.

331. Voidable transfers :—Where the alienation is not void but voidable only, and would bind the minor until it is set aside, he cannot ignore the transaction but must sue to set it aside within the period prescribed by this Article. Even though the suit is framed as a suit for possession, still it will be treated as a suit to set aside the sale, under this Article, because he cannot establish his right to posses-

transferee would be barred though his vendor is not barred. Such interpretation of Art. 44 would lead to another anomaly under the following circumstances: Suppose the guardian makes the alienation shortly before the ward attains majority, and the ward does not sue within 3 years of his attaining majority, but transfers the property before the end of three years. Now, after the lapse of three years, the minor's right to the property will be extinguished, by the operation of sec. 28, but the transferee will be entitled to institute a suit for possession within 12 years from the date of possession taken by the guardian's alienee; and if he brings a suit within that time he will not be barred although his vendor is barred. See *Ramaswami v. Govindammal*, 56 M.L.J. 332, A.I.R. 1929 Mad. 313 (319). Such an anomaly could not have been contemplated by the Legislature, and so it has been held in several cases that a suit by the transferee of the ex-minor is governed by the same rule of limitation as a suit by the ex-minor himself (*viz.*, 3 years' rule under Art. 44)—*Ramaswami v. Govindammal*, *supra* (dissenting from 49 Bom. 309); *Laxmana v. Rachappa*, 42 Bom. 626, 20 Bom. L.R. 408, 46 I.C. 22; *Chandra v. Maruti*, 5 N.L.R. 50, 2 I.C. 229.

332. Section 7—This Article should be read subject to the provisions of section 7. Thus, two brothers brought a suit to set aside a sale effected by their mother as guardian during their minority. The suit was brought within three years of the younger brother attaining majority but more than three years after the elder brother came of full age. Held that the claim being a joint claim and the suit having been brought more than 3 years after the attainment of majority of the elder brother, who as manager of the family was competent to give a valid discharge under section 7 as soon as he became a major, the claim was barred by limitation even in respect of the share of the younger brother—*Doraisami v. Nondisami*, 38 Mad. 118 (F.B.), *Mahableshwar v. Ramchandra*, 38 Bom. 94, 21 I.C. 350; *Kuppuswami v. Kamalammal*, 43 Mad. 842; *Babu Talya v. Bala Raoji*, 45 Bom. 446. But if the elder brother does not act as the manager (*e.g.*, in a case where the father is still living) he cannot give a valid discharge on behalf of his minor brothers; and so in such a case, a suit brought by the younger brothers within three years of their attaining majority, to set aside an alienation made by their father is not barred, although their eldest brother had long before three years reached majority—*Janahir v. Udai Perakash*, 48 All. 152 (P.C.), A.I.R. 1926 P.C. 16, 30 C.W.N. 689, 93 I.C. 216, followed in *Narayana v. Venkataswami*, 51 M.L.J. 845, A.I.R. 1926 Mad. 1190, 93 I.C. 31.

<p>45.—To contest an award under any of the following Regulations of the Bengal Code:— The Bengal Land-revenue Settlement Regulation, 1822 (VII of 1822).</p>	<p>Three The date of any of the following years. the final Regulations of the Bengal a w a r d or Code:— order in the The Bengal Land-revenue Settlement Regulation, case. 1822 (VII of 1822).</p>
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The Bengal Land-revenue
Settlement Regulation
1825 (IX of 1825).

The Bengal Land-revenue
(Settlement and Deputy
Collectors) Regulation,
1833 (IX of 1833).

333. Scope of Article.—This Article would apply even though the plaintiffs were not parties to, and did not appear in, the Settlement proceedings—*Tulsiram v. Mohamad*, 10 W R. 48. Under this Article, any person who wishes to contest an award, whether bound by it or not, must bring his suit within three years. But Article 46 applies only to those persons who are bound by the award, and relates to suits for recovery of property.

This Article does not apply unless the award is a valid one and made in accordance with the provisions of law. Where the Assistant Collector not being able to come to any decision as to the possession and rights of the parties in an estate, refers the whole matter to the Collector, and he without hearing the parties and after only reading the evidence taken by the Assistant Collector, passes an order, such an order has no element of a judicial character and has not the authority of an award, it need not be contested within 3 years, but the party may bring a suit for possession within 12 years—*Bhaoni v. Maharaj Sing*, 3 All 738 Regulation VIII of 1822 does not empower the Collector to decide disputes as to title between raiyats, but only to decide disputes in regard to the nature of any tenancy. A decision by the Collector as to the title between two raiyats is not an 'award' under the Regulation or within the meaning of this Article—*Rajani Kant v. Ram Dulal*, 17 C W.N. 55, 17 I C. 881. A suit not to set aside an award but to obtain possession of land from which the plaintiff has been dispossessed by virtue of an order under sec. 145 Criminal Procedure Code which was to the effect that the defendants were in occupation of the disputed land on the strength of a settlement made in their favour, does not fall under this Article—*Midnapur Zemindary Co. v. Naresh Narayan*, 49 Cal. 37, 33 C.L.J. 497, A I.R. 1922 Cal 345. The "award" contemplated by this Article presupposes a contest between the parties and a decision after proper investigation into the points at issue. Where there is nothing to indicate that there was any contest or a decision on any investigation, but the only object of the suit is that the plaintiffs may be confirmed in their possession of the lands if they succeed in it, and the settlement by the Revenue authorities, in so far as it determined the amount of the revenue payable in respect of the disputed property, would in no way be affected, the only result being that the plaintiffs would in that case obtain the benefit of a settlement which a third party obtained from the Government, Article 45 does not apply—*Latifa Khatun v. Tofer Ali*, 55 Cal 201, 104 I C. 655, A.I.R. 1927 Cal 902.

334. Limitation.—In a suit to contest an award of a Survey Deputy Collector, the period of limitation begins to run, where there has been an unsuccessful *appeal* to the Commissioner and then to the Board of Revenue, from the date of the order of the latter—*Kishen Chunder v. Mahomed Afzal*, 10 W.R. 51. Where A and B were similarly affected by a survey award, and A appealed but B did not, the period of limitation in respect of B's suit to set aside the award would run from the date of the award, and not from the date of the order on A's appeal in which B did not join—*Tulsiram v. Mahomed*, 10 W.R. 48. A settlement award under Regulation VII of 1822 in favour of a mortgagee in possession becomes binding upon the mortgagor if he allows it to remain unchallenged for three years; and the mortgagor is thereafter debarred from bringing a suit for redemption—*Sreechund v. Mullick*, 9 W.R. 564.

46.—By a party bound Three The date of the final
by such award to years. award or order in the
recover any pro- case.
perty comprised
therein.

335. Scope of Article.—The 'award' referred to in this Article is an award under the Regulations mentioned in Art. 45. An award passed in a civil suit is not one coming under this Article—*Lachman v. Atma*, 25 P.R. 1883. This article applies only to parties 'bound by the award'. A person who was not a party to an award or order, is not bound by it, and is not therefore debarred from bringing a suit for possession under the twelve years' rule of limitation—*Pureeag v. Shib*, 3 W.R. 165; *Kanto v. Asad*, 5 C.L.R. 452. A suit for the reversal of a survey award and for recovery of possession, alleging dispossession on a date subsequent to the date of the award, is not governed by Article 45 or 46 but by the 12 years' rule of limitation (Art. 142)—*Mozaffur v. Girish*, 10 W.R. 71.

This Article will not enable a person to come in within 3 years from the date of the award and recover possession of lands in respect of which his suit is barred by other provisions of the law of limitation—*Beer Chand v. Ramgutti*, 8 W.R. 209; *Maula Baksh v. Keshoram*, 10 W.R. 249.

In a thakbust map, a land was demarcated as belonging to A. B claimed that it belonged to him jointly with A. On 18th November 1858 the map was rectified by demarcating the land to A and B jointly. On 11th December 1865, A brought a suit against B for a declaration of his sole right and confirmation of possession, and alleged that he had been in possession even since. It was held that a suit by a person in possession to have his title confirmed was not a suit to recover property within this Article and was not barred by reason of its not being brought within three years from the date of the award—*Mohima v. Rajkumar*, 10 W.R. 22.

47.—By any person bound Three The date of
by an order respecting years. the final
the possession of im- order in the
moveable property case.

made under the Code of Criminal Procedure, 1898, or the Mamlatdars' Courts Act, 1906, or by any one claiming under such person to recover the property comprised in such order.

336. Change—The word "Immoveable" has been added in 1908. Under the Act of 1877 Article 47 referred to immoveable as well as moveable property—*Kangali v. Zomurrudonissa*, 6 Cal. 709 But the Act of 1908 confines this Article to *immoveable* property alone.

337. Application of Article :—This Article is not confined in its operation to orders passed under Ch XII of the Cr. P. Code. An order restoring possession under sec. 522 Cr. P. Code is an order respecting the possession of property within the meaning of this Article, and must be brought within 3 years of the order—*Pakki Adinarayana v. Suramma*, 48 M.L.J. 372, A.I.R. 1925 Mad. 799, 86 I.C. 744.

Where the plaintiff had no legal right to possession *at the time* the order under sec. 145 Cr. P. Code was made against him, but subsequently acquired that right, this Article would not apply to a suit for possession brought by him after he acquired such right; Art. 144 would apply to the case—*Bolai Chand v. Samiruddin*, 19 Cal. 646, *Subbalakshmi v. Narasimiah*, 52 M.L.J. 482, 102 I.C. 360, A.I.R. 1927 Mad. 586.

This Article has no application where the order of the Magistrate was passed *without jurisdiction*. Thus, in a case under sec. 145 Cr. P. Code, the Magistrate has to decide as to which party is in possession; but if the Magistrate goes beyond this, and decides the mode of possession or how that possession is to be exercised, or makes an order for joint possession, his decision is without jurisdiction, and Article 47 does not apply to a suit by one of the parties to establish his rights. Moreover, this Article has no application where the Magistrate's order does not disposes the plaintiff or maintain the defendant's possession to the exclusion of the plaintiff—*Rohini Nandan v. Jadunanalan*, 30 C.W.N. 378, 97 I.C. 73, A.I.R. 1926 Cal. 1022. But every defective or erroneous order of the Magistrate should not be considered as passed 'without jurisdiction'. Thus, in a proceeding regularly initiated under sec. 145 Cr. P. Code the Magistrate passed an order as to possession, but the provisions of subsection (4) of that section were complied with. It was held that the order of the Magistrate might be defective or irregular, but it was not passed without jurisdiction, and a suit to recover the property comprised in the order fell under Art. 47. Before want of jurisdiction can be pleaded, a vice must be clearly established which infects the whole proceeding. When an inquiry has been duly entered upon under section 145 Cr. P. Code,

it is not every error that makes the result invalid—*Ear Mahamed v. Heyat Mahamed*, 22 C.W.N. 342 (345, 346), 42 I.C. 768; *Rani Abadi Begam v. Ahmad Mirza*, 11 O.L.J. 757, A.I.R. 1925 Oudh 190. So also, the mere fact that the Magistrate acting under sec. 145 Cr. P. Code did not make the proper inquiries which he ought to have made before he passed the order, or did not serve any notice on the plaintiff in accordance with law, does not make the order illegal or without jurisdiction, especially when the plaintiff had notice of the proceedings and put in a written statement before the Magistrate. A suit to recover possession of property comprised in such order falls under this Article—*Parasuramayya v. Ramachandradu*, 38 Mad. 432, 21 I.C. 564. See also *Gangaram v. Sankarappa*, 9 M.L.J. 91.

This Article does not apply where there was no order by the Magistrate as to possession of property. Thus, a Magistrate who, finding himself unable to determine who was in actual possession of certain lands, attaches those lands under sec. 146 of the Criminal Procedure Code, and places them in charge of a Sub-Magistrate, does not make an order respecting the possession of property, and a suit in respect of the property does not fall under this Article—*Akilandammal v. Periasami*, 1 Mad. 309; *Raja of Venkatagiri v. Isakapalli*, 26 Mad. 410 (413); *Goswami v. Girdhariji*, 20 All. 120, see also *Deo Narain v. Webb*, 28 Cal. 86. When a person was a party to a litigation in a Civil Court, and an order is made by the Magistrate with regard to possession of immoveable property as the result of the adjudication in the Civil Court, such a person cannot be properly described as a person bound by the order of the Magistrate, but as a person bound by the order of the Civil Court, because the Magistrate is merely carrying out the order of the Civil Court. The Magistrate's order is not one promulgated under the Cr. P. Code, and Art. 47 cannot apply—*Alagarwami v. Ramabadra*, A.I.R. 1929 Mad. 38 (40), 111 I.C. 152.

This article applies although the order was passed summarily without investigation. Thus, where a suit was dismissed by the Mamlatdar for the non-appearance of the plaintiff, he must bring his suit for possession in the Civil Court within three years under this Article—*Ramachandra v. Bhikibai*, 6 Bom. 477; so too, if the suit was dismissed by the Mamlatdar for non-appearance of both parties—*Purushottam v. Chatagir*, 25 Bom. 82. An order of the Mamlatdar dismissing the plaintiff's claim for possession on account of lack of proof is tantamount to an order confirming the defendant's possession, and is therefore an order 'respecting the possession of property' under this Article—*Chinto v. Ganesh*, 1883 P.J. 131.

Where a plaintiff against whom an order was passed by the Mamlatdar in 1885, continued in possession in spite of the adverse order, up to 1887, when he was dispossessed in execution of a decree in another proceeding, a suit brought by him to recover possession in 1890 was not barred by this Article, because there was no necessity for the plaintiff to bring a suit to recover possession under this Article within 3 years from the order of 1885 if he continued in possession in spite of that order—*Krishnacharya v. Lingama*, 20 Bom. 270.

This Article does not apply where the plaintiff brings the suit in a different capacity from that in which he sued before the Mamlatdar. Thus, where a suit instituted by the plaintiff in his private capacity as the heir of the deceased manager of a *Math* was dismissed by the Mamlatdar for non-production of certificate of heirship, a subsequent suit brought by the plaintiff in his representative capacity, describing himself as the manager of the *Math*, was not governed by Art. 47—*Babajirao v. Laxmandas*, 28 Bom. 215. Where after the order of the Mamlatdar in a possessory suit, the parties entered into a contract for sale in respect of the property in dispute, such a contract dissolves the order of the Mamlatdar; it is unnecessary to bring a suit to set aside the order; and a suit based on the contract of sale is not barred by reason of not having been brought within three years from the date of the order of the Mamlatdar—*Sagaji v. Namdev*, 23 Bom. 525 (527).

“*Person bound by the order*”.—Where the manager of a joint Hindu family in his capacity as such is a party to proceedings under sec. 145 Cr. P. Code, the joint family as a whole is a party, and the proceedings will bind any member of the joint family in his capacity as such. Consequently, a suit by a member of a joint family to recover possession of properties from the defendant whose possession had been confirmed by an order under sec. 145 Cr. P. Code to which the manager of the joint family was a party and not the other members of the family, is governed by this Article. All persons who, though not parties to an order under sec. 145 C. P. Code, had actual notice of the order are “bound” by that order within the meaning of this Article—*Venkatasomaraju v. Varakalaraju*, 52 Mad 787, 57 M L J. 228, A I R 1930 Mad 48 (49, 51), 122 I.C. 171. Compare 45 All. 306, cited in the next note.

338. “Any one claiming under such person”—This Article applies to all persons who are bound by or parties to an order under sec. 145 Cr. P. Code, as well as to any other person who may claim the property through any such person under a title *derived subsequent* to the order—*Jogendra v. Brojendra*, 23 Cal. 731 (F B.) If a party defeated in the proceedings before the Mamlatdar’s Court fails to bring a suit to set aside the Mamlatdar’s order within three years, as provided by this Article, a suit brought by the assignee of such party will be barred. The assignee cannot be in a better position than the original party—*Bapu v. Mahadaji*, 18 Bom 348. If an order is passed in respect of a property under sec. 145 Cr P Code against the managing member of a joint Hindu family, it is binding on the whole family, and a suit brought by the surviving members of the family, after the death of the managing member, to recover the property, will be governed by this Article—*Ram Sahai v. Benode Behari*, 45 All 306 (308), 21 A L J. 102, 71 I.C. 402, Cf. 52 Mad 787 *supra*.

339. Suit to recover property—This Article does not apply to a suit for possession based on title. Thus, the Mamlatdar’s Courts Act gives the Mamlatdar no power to decide upon the rights of the parties, and his order rejecting a suit or disallowing a claim involves

no decision as to the *title* of the plaintiff. Consequently he is not bound to sue within three years under this Article for recovery of possession *based on title*. This Article has been prescribed for suits to set aside *orders respecting possession only*—*Tukaram v. Hari*, 28 Bom. 601 (F.B.) Where a Mamlatdar has made an order respecting the possession of a joint property, and the plaintiff who has been dispossessed by the order brings a suit to establish his right to and to recover a fourth share of the property, *held* that this Article does not apply, for the suit is in substance a suit for partition though nominally it is one for recovery of the property comprised in the Mamlatdar's order—*Bhagupat v. Amaba*, 5 Bom 25; *Shivaram v. Narayan*, 5 Bom 27, *Parashram v. Rakhma*, 15 Bom. 299 Where a suit is not one to recover any property but for a declaration of the plaintiff's right to put up dams in a river and to irrigate their lands by means of such dams. Art. 47 does not apply—*Eshan Chunder v. Nilmoni*, 35 Cal 851. On the other hand, if the suit is really one to recover a property in respect of which an order has been passed under sec. 145 of the Criminal Procedure Code, the plaintiff can not evade the provisions of this Article and claim an enlarged period by describing his suit as one for declaration of title—*Ram Sahai v. Benode Behari*, 45 All 306 (308), 21 A.L.J. 102, A.I.R. 1923 All 151

If a Magistrate attaches a property under sec. 146 Cr. P. Code and appoints a receiver thereof, the property is, in the eye of the law, in *custodia legis*. It is held in the custody of the Court for the benefit of the person who may eventually and finally succeed in establishing his title to the property. In such a case no party is under any obligation to bring a suit to *recover the property*, but can only sue to *establish his right* to the property. To 'recover' means to recover property from the possession of other party to whom possession has been given—*Alagarswami v. Ramabadra*, A.I.R. 1929 Mad 38 (41), 111 I.C. 152. A suit for a *declaration of a right of way* over the land of the defendant need not be instituted within three years of the date of the Magistrate's order passed in favour of the defendant under sec. 145 Cr. P. Code, in as much as the proceedings under that section have reference to the possession of the soil and involve no question of right of way—*Kalachand v. Jotindranath*, 57 I.C. 852 (Cal.).

340. Starting point of limitation :—It was held that the period of limitation ran from the date of the Magistrate's order, and not from that of a confirmation order by the Sessions Judge—*Kangali v. Zomurrudonnissa*, 6 Cal. 709 It was also held that time ran from the date of the Magistrate's order and not from the date on which a rule issued by the High Court under sec. 15 of the Charter Act against the Magistrate's order was disposed of; because an order of the Magistrate under sec. 145 of the Cr. P. Code was a 'final order' within the meaning of this Article since it was not subject to appeal, review or revision, and the Charter Act was not contemplated by the Legislature when they drew up the provisions of Art. 47—*Jagannath v. Ondal Coal Co., Ltd.*, 12 C.W.N. 840. But these two rulings are no longer good law, because under the Criminal Procedure Code as amended in 1923, orders under

section 145 passed by a Magistrate are not final, but are open to revision under the Code itself.

When once limitation has begun to run, the plaintiff will not be entitled to a fresh starting point from the date of attachment by the Criminal Court—*Deo Narain v. Webb*, 28 Cal. 86.

If the defendant against whom an order has been passed by the Mamlatdar fails to bring a suit under this Article for the recovery of the property within three years, his title to the property is not extinguished. Consequently, if he gets into possession again, such possession should be referred to his then subsisting title; and any one, who after his re-entry disputes his title, will have to prove his own as against the title of the defendant, independently of any question of limitation arising under this Article—*Parashram v. Rakhma*, 15 Bom. 299 (304).

<p>48.—For specific moveable property lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining in the same.</p>	<p>Three years.</p>	<p>When the person having the right to the possession of the property first learns in whose possession it is.</p>
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341. Scope of Article :—This Article is a special one, whereas Article 49 is a general provision, and the well established rule is that where the special provision applies, the general provision does not apply. Article 48 deals only with specific moveable property which falls under one of two classes, *viz* (1) such property as has been lost, or (2) as has been acquired by (a) theft, (b) dishonest misappropriation, or (c) conversion. No other kind of moveable property is affected by this Article. If the case is not covered by this Article, then Article 49 will apply—*Lodna Colliery v. Bepin Behary*, 1 P.L.T. 84, 55 I.C. 113 (133).

Specific moveable property—‘Specific moveable property’ means property of which you may demand the delivery in specie—*Surat v. Umar*, 22 Cal. 877 (882), *Essoo v. Steam Ship “Savitra,”* 11 Bom. 133 (137). It means property which can be specified by the delivery of the identical subject, and does not cover money—*Agandh Mahto v. Khajah Alijullah*, 11 C.W.N. 862 (dissenting from *Rameswar v. Mata Bhik*, 5 All. 341); *Lala Gobind v. Chairman*, 6 C.L.J. 535; *Sankunni v. Gobinda*, 37 Mad. 381; *Jagivan v. Gulam Jilani*, 8 Bom. 17 (19). In some cases, however, money has been held to be included in ‘specific moveable property’ See *Ram Lal v. Ghulam Husain*, 29 All. 579; *Tala v. Mohri*, 7 I.C. 5, *Rameswar v. Mata Bhik*, 5 All. 341.

G. P. Notes and title-deeds are specific moveable property—*Gopal v. Surendra*, 12 C.W.N. 1010; *Subbakka v. Moruppakkala*, 15 Mad. 157. Crops when standing on the land are immoveable property; but when severed from the land, they become moveable property—*Surat Lal v. Umar*, 22 Cal. 877 (1883); *Mangun v. Dolhin*, 25 Cal. 692 (1899) (F.B.).

Conversion :—"An act of conversion may be committed—(1) when property is wrongfully taken, (2) when it is wrongfully parted with, (3) when it is wrongfully sold in market overt, although not delivered, (4) when it is wrongfully retained, and (5) when it is wrongfully destroyed or changed in nature. Anyone who without authority takes possession of another man's goods with the intention of asserting some right or dominion over them is *prima facie* guilty of conversion"—Clark and Lindsell on Torts, 6th Edition, p. 252 And so where the defendant committed an underground trespass into the plaintiff's colliery and extracted and carried away a certain quantity of coal, a suit by the plaintiff for the value of coal so removed is governed by this Article, as the defendant has taken possession of the coal belonging to the plaintiff with the intention of asserting some right or dominion on it, and his act therefore amounts to conversion—*Lodna Colliery Co Ltd v Bepin Behary*, 1 P L T 84, 55 I.C. 113 (133, 134), approved of by the Privy Council in *Pugh v Ashutosh*, 56 I.A. 93, 8 Pat. 516, A I.R. 1929 P.C. 69, 114 I.C. 604, 33 C.W.N. 323 (328); *Adjai Coal Co Ltd. v. Panna Lal*, 57 I.A. 144, 34 C.W.N. 483 (487), A I.R. 1930 P.C. 113, 123 I.C. 726, overruling *Panna Lal v. Adjai Coal Co Ltd.*, 31 C.W.N. 82, A I.R. 1927 Cyl. 117, 101 I.C. 62 (where Article 49 was applied and Art. 48 was held to be inapplicable). The word "dishonest" does not qualify the word "conversion" The word "dishonest misappropriation or conversion" should be read as "dishonest misappropriation or by conversion." Otherwise there is no provision in the Article for simple conversion. Moreover, there is no ground for splitting up conversion into two classes, one dishonest, and the other not dishonest This Article would apply even though the defendant converted the thing to his own use under an honest belief—*Pugh v. Ashutosh*, supra. Article 48 applies to all conversions, whether dishonest or not, and whether the trespass is due to mere inadvertence or to inadvertence without reasonable care—*Adjai Coal Co Ltd. v. Panna Lal*, supra (overruling 31 C.W.N. 82).

342. Limitation :—Limitation runs from the time when the plaintiff first learns in whose possession the property is. Where plaintiff entrusted a certain jewel to a person for sale, and the latter pledged it for his own use, a suit by the plaintiff to recover the jewel or its value from the pawnee is governed by this Article, and would be in time if brought within three years from the date on which the plaintiff knew that the jewel was in the possession of the pawnee—*Seshappier v. Subramania*, 39 Mad. 783, affirmed on appeal in 40 Mad. 678. It is for the plaintiff to prove the facts which would bring the claim within time; it is for him to show that he had first had the necessary knowledge within three years prior to the suit—*Bank of Bombay v. Fazalbhoy*, 24 Bom. L.R. 513 (per Shah J.), 67 I.C. 701.

343. Cases :—The brother of the defendant had appropriated to his use certain goods of the plaintiffs and after his death the defendant sold the goods and held the sale proceeds as agent for his deceased brother's widow. The plaintiffs brought a suit to recover the money. *Held* that the case did not come under Article 48, because there was no dishonest misappropriation or conversion by the defendant; the defendant sold the goods on account of his brother; he held the proceeds on account of his brother's widow. There was no dishonest conduct on the part of the defendant, although the plaintiffs had a right, finding the money in his hands, to make him responsible for it. The suit fell under Article 120—*Gurudas v. Ram Narain*, 10 Cal. 860 (864) (P.C.) A 5 per cent. G. P. Note for Rs. 3,800 was deposited in Court, and was lost by the Court. Many years afterwards, it was traced and it was found that it stood in the name of one who had converted it into a 3½ per cent G. P. Note for Rs. 4,100. Thereupon the plaintiff instituted a suit against him. The defendant pleaded that he purchased the Note in good faith from one since deceased. *Held* that the suit did not fall under this Article as there was no proof of theft or dishonest conversion—*Chandra Kali v. Chapman*, 32 Cal. 799 (814).

A suit for damages for misappropriation of crops grown on plaintiffs' land on the allegation that the defendants had wrongfully and forcibly cut and carried away the crops, falls under Article 48 or 49, and not under Art 36 which is a general Article for action on torts—*Surat Lall v. Umar*, 22 Cal. 877 (882, 883); *Mangun v. Dolhun*, 25 Cal. 692 (699) (F.B.); *Jadu Nath v. Hari Kar*, 17 C.W.N. 308, 18 I.C. 253 (254), (overruling *Jadu Nath v. Hari Kar*, 36 Cal. 141).

A suit to recover the price of materials of a house removed and misappropriated by the defendants must be brought within the period prescribed by this Article—*Tafazul v. Mahomed*, 52 I.C. 360 (Pat.) A suit against an innocent person to recover stolen property or its value as damages falls under this Article, and time runs from the date the plaintiff knew that the property had come into the defendant's possession—*Sohan Singh v. Mull Singh*, 229 P.L.R. 1911, 11 I.C. 446. Where in pursuance of the directions of a will, the executors deposited a number of G. P. Notes in a Bank to accumulate until the minor legatee attained majority, but some time before that event, they got the G. P. Notes sold by the Bank and drew out the amounts, *held* that a suit by the legatee against the Bank for the amounts thus drawn out must be treated as one for conversion, to which Art 48 would apply. If it is to be treated as a suit for money received by the defendant as sale-proceeds and properly payable to the plaintiff, Article 62 would apply—*Bank of Bombay v. Fazalbhoy*, 24 Bom. L.R. 513, 67 I.C. 761, A.I.R. 1923 Bom. 155.

48A.—To recover Three When the sale becomes
moveable property years. known to the plain-
conveyed or be- tiff.
queathed in trust,

deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.

This Article and the next have been added by the Indian Limitation Amendment Act I of 1929. Article 48A is the same as Article 133 (now omitted), which ran as follows :—

133 —To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	Twelve years	The date of the purchase.
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Thus, the first column of Article 48A is the same as that of Art. 133; the period of limitation is reduced from 12 years to three years and time runs *when the sale becomes known to the plaintiff*, instead of from "the date of the purchase." The reason of the amendment has been thus stated.—"We consider that the date when the plaintiff obtains knowledge of the transfer he seeks to attack is the most suitable date from which limitation should run. If limitation runs from the date of the transfer itself, it is a simple matter for a dishonest trustee and a colluding transferee to conceal the fact of the transfer until the period of limitation has expired If this point is ceded, then there is no reason to maintain such a long period as 12 years in the case of the sale of moveable property under Article 133 (48A) We consider that in these cases a period of 3 years is quite sufficient"—*Report of the Select Committee* (Gazette of India, 1927, Part V, p 258).

344. Article 133 (now 48A) is an abridgment in favour of the purchaser for valuable consideration of the period provided in Art. 145 in cases of deposit and pledge, and an enactment of a special period of 12 years (now 3 years) in the case of a purchaser from a trustee, when under sec. 10 there would be no limitation at all in a suit against the trustee himself—*Gangineni Kondiah v. Gothipati Pedda*, 33 Mad. 59 (68).

This Article uses the words "brought" and "purchase" and does not therefore apply to a mortgage—*Bank of Bombay v. Fazalbhoy*, 24 Bom. L.R. 513, A.I.R. 1923 Bom. 155.

48B.—To set aside sale of moveable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment,	Three years.	When the sale becomes known to the plaintiff.
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made by a manager thereof for a valuable consideration.

This Article has been added by the Indian Limitation Amendment Act I of 1929. The suits contemplated by this Article were not previously provided for in any Article. These are suits by persons interested in the endowment to set aside alienations of the endowed property made by the manager. In these cases the plaintiff is not entitled to possession, and cannot therefore claim to recover the property; but he may sue to have the transfer set aside and for any consequential relief which may be adapted to the circumstances of the case. For this class of cases the Legislature has provided Article 48B in respect of moveable property, and Art. 134A in respect of immovable property—*Report of the Select Committee* (Gazette of India, 1927, Part V, p. 255).

49.—For other specific Three When the property is
moveable pro- years. wrongfully taken or
perty, or for com- injured or when the
pensation for detainer's possession
wrongfully taking becomes unlawful.
or injuring or
wrongfully de-
taining the same.

345. Specific moveable property :—See notes under Art. 48.

Legacy :—A suit to recover specific moveable property from one who is in unlawful possession thereof, is governed by this Article, even though the property is the subject of a legacy. Art. 123 does not apply to such a suit—*Issar v. Jaggut*, 9 Cal. 79.

Idols :—A suit for recovery of the Thakurs of a temple from the possession of the defendants is not governed by this Article, in as much as the Thakurs (idols) are not specified moveable property but are considered as juridical persons, especially in a suit like the present where the Thakurs are themselves made plaintiffs—*Bali Panda v. Jadamani*, 38 Cal. 284.

Account books and mortgage-deeds are specific moveable properties—*Durga Devi v. Ram Nath*, 85 P.R. 1919, 52 I.C. 580.

346. Wrongful taking :—Article 49 applies not only where the property is wrongfully taken, but also where the original possession of the defendant is lawful but it becomes unlawful by reason of certain facts, e.g., where the plaintiff demands the moveable property from the defendant and the latter refuses to deliver it up—*Bhupendra v. Gounda*, 32 C.W.N. 133 (138), 106 I.C. 885. Where, under the erroneous order of the Magistrate, the defendant took possession of the property, he guilty of wrongful taking which gives the true owner a cause of In such a case, time runs under Art. 49 from the date is wrongfully taken—*Ramachary v. Mathachary*, 30 Mad.

whether the receipt was *wrongful*. Compare 3 C.L.J. 182 cited in Note 463 under Article 109. Where trees are wrongfully cut down and subsequently the wood so lying on the ground is wrongfully taken, the suit for compensation will be in time under this Article, if brought within three years of the wrongful taking—*Aiyappa Reddi v. Kuppasami*, 28 Mad. 208. The plaintiff was the owner of a house which was mortgaged to defendant. In August 1885 defendant took the key of the house from the plaintiff and sold it under a power of sale contained in the mortgage-deed. In the house there had been stored a certain quantity of timber not mortgaged, which was not returned to the plaintiff after the sale. The plaintiff brought a suit in September 1887 to recover the value of the timber, alleging that the defendant had taken it and converted it to his own use. *Held* that the suit was one for compensation for wrongfully taking specific moveable property, under this Article, and not governed by Article 36—*Passanha v. Madras Deposit and Benefit Society*, 11 Mad. 333.

347. Injury:—This Article applies only to suits in respect of plaintiff's property in the hands of some other person, and not to suits in respect of property in the plaintiff's own possession; and the injury to property mentioned in this Article is limited to cases of injury to property while in the custody of some person other than the owner. Therefore a suit for compensation for damage done to a ship of the plaintiff (while it was in his possession) by collision with the defendant's ship on the high seas does not fall under this Article but under Article 36—*Essoo v. Steam Ship 'Savitri'*, 11 Bom. 133 (137).

348. "When the detainer's possession becomes unlawful" :—The defendant's possession of the plaintiff's property does not become unlawful until the property is *demand*ed by the latter and *refused* by the former. Mere detention is not unlawful—*Maganalal v. Thakurdas*, 7 I.C. 447; *Kalicharan v. Ganeshi*, A.I.R. 1928 Oudh 47. Where the plaintiff had made over a certain quality of gold to the defendant to be made into ornaments, but no time was fixed, and the latter put him off from time to time until being pressed by the plaintiff he promised to make and deliver the ornaments on the 8th April, but failed to do so, *held* that a suit for recovery of the gold deposited was governed by Article 49 or 115 or 145. Under Article 49, the detainer's possession became unlawful when he wrongfully refused to apply the gold to make ornaments as he had originally agreed to do, viz. from 8th April—*Gangahari v. Nabin Chandra*, 20 C.W.N. 232 (233), 34 I.C. 959.

Mere silence on the part of the defendant on demand of the moveable property being made does not constitute refusal to deliver up the property. Time runs when there is a definite refusal to do so—*Gopalasami v. Subramania*, 35 Mad. 636 (639). Where moveables are entrusted to any person on the condition that they will be returned on the expiry of a specified period, the mere fact that they are detained beyond that period does not render the detainer's possession unlawful. It is only when a demand is made and there is a refusal to comply with the demand that

the defendant's possession becomes unlawful, and limitation runs from the date of such refusal—*Laddo Begum v. Jamaluddin*, 42 All 45, 17 A.L.J. 907, 52 I.C. 382. Where the possession of a jewel by the defendant was originally permissive, the character of that possession would not be changed by the fact that he subsequently set up a claim to the jewel as his own property. His bare assertion that the jewel is his own property does not make his possession unlawful. His possession becomes unlawful only when there is a formal demand for return of the jewel and a refusal to comply with it. Under this Article, time would begin to run from the date of his formal refusal to comply with the demand—*Ma Mary v. Ma Hla*, 2 Rang. 555 (557), A.I.R. 1925 Rang 146, 85 I.C. 10. The mere non-payment of the rent of a machine does not amount to a wrongful taking or detaining of it; the cause of action arises only when the machine is demanded back and refused—*Singer Manufacturing Co. v. Flynn*, 13 A.L.J. 81, 27 I.C. 637. A testator bequeathed certain specific moveable property to A, which A sold to C. B obtained a certificate under Act XXVII of 1860 and took possession of the property. The certificate was cancelled and B was ordered to hand over the property to A or his vendee C on the 19th August 1873. C instituted his suit on the 22nd March 1878. It was held that the suit fell under this Article and time began to run from 19th August 1873, the date of the Court's order, from which time B's possession became unlawful—*Issur v. Juggut*, 9 Cal. 79. B sold moveable and immovable properties to A, but instead of putting him in possession, sold the properties to C and put him in possession. A brought a suit for specific performance against B and C in which he obtained a decree, but as C still continued in possession of the moveable property, B brought a suit against him to recover it. Held that C's detainer became unlawful from the date of the decree for specific performance—*Dhondiba v. Rama Chandra*, 5 Bom. 554. After the redemption of a mortgage, the title deeds of the mortgaged premises remained with the mortgagee, who on demand for their return refused to give them up. A suit for recovery of the deeds was held to be governed by this Article and time began to run from the date of demand for the deeds, after which their retention became unlawful—*Subbakka v. Maruppakkala*, 15 Mad 157.

349. Deposit :—Where the transaction amounts to a deposit, the more specific Article 145 (and not the general Article 48 or 49) applies. Thus, a suit to recover moveable property deposited with the defendant for safe custody, or in the alternative for its value, is governed by Article 145 which is more specific than Article 48 or 49. Even the fact that there has been a demand for the return of the deposit and a refusal to return by the depositary, which makes the defendant's possession wrongful, does not attract the provisions of section 49 so as to make the suit as one "for specific moveable property or for compensation for wrongfully detaining the same"—*Narmadabai v. Bhabanishankar*, 26 Bom. 430; *Gangineni Kondiah v. Gottipati, Pedda*, 33 Mad 56. But in an exactly similar case, where the plaintiff handed over some jewellery to the defendant for safe custody, the Allahabad High Court held that a suit for

recovery of the jewellery or its value was governed by Article 49—*Laddo Begam v. Jamaluddin*, 42 All 45, 17 A.L.J. 907. No reference was made in this case to Article 145 or to the Bombay and Madras cases cited above.

Where the defendant who was entrusted with a jewel to pledge it and raise loan on it on behalf of the plaintiff, did so, but after the plaintiff repaid the loan, the defendant got back the jewel from the pledgee but did not return it to the plaintiff though demand was made for its return, it was held that as there was no agreement that the jewel should remain in deposit with the defendant after the repayment of the loan, Article 145 would not apply to a suit to recover the jewel, but Art. 49—*Gopalasami v. Subramania*, 35 Mad. 636 (638).

See *Administrator-General v. Krishto Kamini*, 31 Cal. 519 cited in Note 628 under Art. 145. See also Note 630 under Art. 145 where the distinction between Arts 145 and 49 has been pointed out.

350. Where Article does not apply :—This Article is inapplicable where the plaintiff has not strictly speaking a personal claim to the property, as for instance, where he claims it in a representative capacity as the shebait of a temple—*Gossami Sri Gridhariji v. Ramanlalji*, 17 Cal. 3 (P.C.). A suit by an heir of a Mahomedan to recover a fourth share of certain specified moveable properties left by the deceased is really a suit for partition of those properties, and falls under Article 120, not under this Article—*Bashirunnissa v. Abdur Rahman*, 44 All. 244, A.I.R. 1922 All. 525, 64 I.C. 974. A suit by a Mahomedan widow against the brother of her deceased husband, for a declaration of her life-interest in the estate of her husband according to local custom, is not governed by Article 49, as this Article is not applicable to a suit to establish a right to inherit the property of a deceased person; nor is it a suit for distributive share of property under Art. 123. The suit falls under Art. 120—*Mamomed Riasat v. Hasin Banu*, 21 Cal. 157 (163) (P.C.). A suit against a Navigation Company for compensation for non-delivery of a timber which is not in the possession of the company, is governed by Article 31, and not by this Article since the property is not in the detainer's possession—*Venkatasubba v. Asiatic Steam Navigation Company*, 39 Mad. 1 (F.B.). Even if Article 49 were applicable, its operation would be excluded by the provisions of Article 31, which is more specific—*Ibid.* A suit for compensation for wrongful seizure of a ship under an order of Court is governed by the more specific Article 29 rather than Article 36 or 49—*Madras Steam Navigation Co. Ltd. v. Shalimar Works Ltd.*, 42 Cal. 85 (108). Where in consequence of a quarrel arising between the plaintiff (a fruitseller) and the ijardar of the market, about the payment of tolls, the latter informed the police and the result was that the boat of oranges brought by the plaintiff was detained at the thana for some days, and while so detained the oranges deteriorated, and then the plaintiff brought a suit against the ijardar for compensation, held that Article 49 did not apply because the plaintiff did not bring this suit to recover any specific moveable property, and it was the police and not

the defendants who took the oranges to the thana and detained them there. The suit falls under Article 36—*Ananda Charan v. Barada Kanta*, 42 C.L.J. 203, 90 I.C. 509, A.I.R. 1926 Cal. 177.

A suit for compensation for wrongful attachment before judgment falls under Article 29 and not under Article 49. The latter Article applies to a case in which moveable property is wrongfully taken or detained by the defendant (i.e. by a private person), and not by the Court in execution of a legal process—*Ram Narain v. Umrao Singh*, 29 All. 615 (617); see also *Narasingha v. Gangaraju*, 31 Mad. 431 (438). In *Manavikraman v. Arisilan*, 19 Mad. 80 (82) such a suit was held to fall under Article 49; the Judges remarked that since the attachment was made at the instance of the defendant, the attachment might be said to have been made by the defendant, and it was immaterial that it was effected through a process of the Court. It was further held in this case that Article 36 might also apply.

Removal of Crops.—As to whether this Article governs a suit for wrongfully cutting and carrying away crops, see Notes 319 and 320 under Article 36.

50.—For the hire of Three When the hire becomes
animals, vehicles, years. payable.
boats, or house-
hold furniture.

51.—For the balance of Three When the goods ought
money advanced years. to be delivered.
in payment of
goods to be deli-
vered.

351. If there be no date specifically fixed for the delivery of the goods, evidence must be taken as to the time when the goods ought to be delivered—*Baiddonath v. Lalunnissa*, 7 W.R. 164

52.—For the price of Three The date of the delivery
goods sold and years. of the goods.
delivered, where
no fixed period of
credit is agreed
upon.

352. A suit for payment of a bill of goods supplied in retail by an ordinary trader is governed by this Article—*Shama Churn v. Collector*, 1 W.R. 308. A suit to recover price of goods supplied by a tradesman on credit, for which payments were to be made on presentation of bill, is governed by this Article, and not by Art. 85, and the period of limitation is three years from the date of delivery—*Dansford v. Shaw & Co.*, 88 I.C. 747, A.I.R. 1925 Pat. 806. Where a tradesman supplies goods from time

to time on credit to a customer who makes payments from time to time on account, no fixed period of credit being agreed upon, the cause of action in respect of each supply must be taken to arise under this Article on the date when each item of goods was supplied. But if there be an implied contract that all the goods supplied within a certain period are to be paid for after the expiration of that period, then limitation would run from the expiry of the period of credit (Art. 53)—*Satcowree v. Kristo*, 11 W.R. 529.

Where a suit is brought against the son for the price of goods sold and delivered to the deceased Hindu father, this Article would apply; but if a decree were obtained against the father, a suit against the son on the cause of action arising from the decree against the deceased father—the decree being a debt which the son is, according to Mitakshara Law, under an obligation to discharge—is governed by Art. 120—*Periasami v. Seetharama*, 27 Mad. 243 (F.B.) A suit for recovery of the price of fruits standing in a garden and sold to the defendant is governed by this Article, the word 'goods' being wide enough to include fruits even before they have been gathered—*Wasu Ram v. Rahim Baksh*, 66 I C 120 (Lah.). Where grain is advanced on a contract that it should be repaid in kind, it is not a case of goods being "sold" within the meaning of this Article. The word 'sold' in this Article refers to a case in which the contract is to pay for the price in money. A suit for the recovery of the value of the grain in kind falls under Art. 65 or 115—*Md. Din v. Sohan Singh*, 65 I.C. 691, A.I.R. 1922 Lah. 271. A suit to recover arrears of subscription of a newspaper is governed by this Article—*Hormasji v. Kharsetji*, 7 Bom. L.R. 190.

A suit for the price of work done and goods supplied under some contract entered into by the plaintiff with the defendants for the supply of labour and materials for repairing and constructing certain buildings is governed by Article 52 so far as the price of goods is concerned, and by Article 56 in respect of price of work done. If the plaintiff has a lien on the buildings for the money due, a suit for the enforcement of that lien is governed by Article 132—*Daulat Ram v. Woollen Mills*, 95 P.R. 1908. But where the claim for the price of work done and for the price of goods supplied is *inseparable and indivisible*, the suit is neither governed by Article 52 nor by Article 56 but is governed by the comprehensive Article 115. Thus, the defendant employed the plaintiff as a contractor to do the work of flooring in a building; the plaintiff was to supply marble and other stone required for the flooring and was also to do all the work necessary for constructing the floor, and was to be paid a certain sum of money for every square foot of the flooring done by him, which rate included both the price of materials supplied and the work done by the plaintiff. The plaintiff sued for a sum of money due to him on the basis of this contract, and the plaint made no mention of the price of the materials as distinct from the price of the work. *Held* that the claim as laid in the plaint was an indivisible one; it could not be split up into two portions; consequently it fell neither under Article 52 nor under Article 56, but was governed by Article 115, which is a

general provision applying to all actions *ex contractu* not specially provided for otherwise—*Md. Ghasita v. Serajuddin*, 2 Lah. 376 (381, 382), 66 I.C. 490, A.I.R. 1922 Lah. 198 (F.B.). In an earlier case, viz. *Radha Kishen v. Basant Lal*, 103 P.R. 1913, 22 I.C. 576, it was held that a suit for the recovery of a sum of money alleged to be due for the price of work done and goods supplied was governed by Article 120, because no single Article (52 or 56) covered the entire claim; Article 56 did not cover the price of goods supplied and Article 52 did not cover the price of work done. This decision is impliedly over-ruled by the Full Bench case cited above.

53.—For the price of Three When the period of
goods sold and years. credit expires.
delivered to be
paid for after the
expiry of a fixed
period of credit.

35³. Where the contract was that the plaintiff would supply wood to the defendants and further that he would indemnify the defendants for loss arising by failure on his part to supply wood, it was held that the intention of the parties having been that the price of wood was not claimable as of right on the date of its being supplied but rather when the contract was completed by the whole wood being supplied or when the contract came to an end, a suit for the price of the wood was not governed by Art. 52 but by this Article—*Pragi v Maxwell*, 7 All. 284. A vendor sent to his vendee a bill for some piece-goods purchased, and at the top of the bill appeared the words "debit interest at $\frac{2}{4}$ per cent per month after 60 days thavanai." In a suit for money due the question arose whether it was a credit sale or a cash transaction. Held that the word *thavanai* meant credit period, and the suit was governed by Art. 53—*K. M. P. R. N. M. Firm v Somasundaram*, 48 Mad. 275, 47 M.L.J. 844, A.I.R. 1925 Mad 161, 85 I C 299

54.—For the price of Three When the period of the
goods sold and years. proposed bill elapses.
delivered to be
paid for by a bill
of exchange, no
such bill being
given.

55.—For the price of Three The date of the sale.
trees or growing years.
crops sold by the
plaintiff to the
defendant where

no fixed period of credit is agreed upon.

- 56.—For the price of Three When the work is done.
work done by the years.
plaintiff for the
defendant at his
request, where no
time has been
fixed for payment.

354. A suit by a goldsmith to recover the price of his labour in making ornaments falls under this Article—*Vishnu v. Gopal*, 1885 P.J. 252; so also, a suit by a printer to recover costs of printing—*Ambica v. Nitya Nand*, 30 Cal. 687. A suit by a Zemindar to recover sums expended by him at the defendants' request for the repair of a tank for the irrigation of lands held by them in common with him, is a suit for work done at the defendants' request, and governed by this Article—*Sundaram v. Sankara*, 9 Mad. 334. As regards a suit by a contractor for recovery of price of work done for constructing and repairing certain buildings as well as for price of materials, see notes under Article 52. Where the plaintiff, a contractor, was engaged by the defendant to do some work for the defendant's principal who was a Ruling Prince, and the plaintiff was refused permission by Government to sue the Prince, a suit against the agent (defendant) was maintainable, and it fell under this Article—*Abdul Ali v. Von Goldstein*, 43 P.R. 1910, 14 P.L.R. 1909, 4 I.C. 902.

In an action for work done, the cause of action arises when the work is completed; and the rule applies even though the work is done for a public body, and no steps have been taken to raise funds for payment—*Emery v. Day*, (1834) 1 Cr. M. & R. 245.

- 57.—For money pay- Three When the loan is made.
able for money years.
lent.

355. Scope :—Art. 57 is applicable to loans payable at once or what is technically called payable *on demand*; it applies to cases where no time is fixed for repayment of the loan. If there is an agreement fixing a certain date for repayment, and the agreement is in writing, Art. 60 or 115 applies. Thus, a suit to recover money lent with interest upon a verbal agreement that the loan should be repaid within one year is not governed by this Article but by Art. 115—*Rameshwar v. Ram Chand*, 10 Cal. 1033; *Ramasami v. Muthusami*, 15 Mad. 380 (381).

356. Pledge :—A suit for money lent under Art. 57 would not be less so, where the money lent is secured by a pledge; the period of

limitation for such a suit would be three years from the date of the loan. Thus, in a suit by a pawnee to recover the balance due on his debt after accounting for the proceeds of the sale of the articles pledged, it was contended by the plaintiff that the time ran under this Article from the date of the sale, because it was only then ascertained that any balance was due on the original loan, but the Court held that time ran from the date of the loan. The suit was one to recover the unpaid balance of a loan, and the fact that moveable property had been pledged did not change the nature of the suit—*Sayid Ali v. Debi Prosad*, 24 All. 251; *Yellappa v. Parasharamappa*, 30 Bom 218. Where the suit on a pledge of certain moveable property is to recover the amount due by sale of the property pledged as also for a personal remedy against the defendant for recovering any balance which may remain due after such sale, the suit will be governed by Art. 57 so far as the personal remedy is concerned, and by Art. 120 so far as the remedy by sale of the pledged property is concerned—*Nim Chand v. Jagabandhu*, 22 Cal. 21; *Madan Mohan v. Kanhai Lal*, 17 All. 284; *Mahalinga v. Ganapathi*, 27 Mad. 528 (F.B.). If the personal remedy is barred, a right to enforce the charge against the property will still exist—*Nim Chand v. Jagabandhu*, 22 Cal 21 (dissenting from *Vitla Kamti v. Kalekar*, 11 Mad. 153).

Thavanai accounts :—A suit for money lent on a *thavanai* account is governed by Art. 60 and not by this Article. See Note 362 under Art. 60.

58.—Like suit when Three When the cheque is
the lender has years. paid.
given a cheque
for the money.

357. This Article follows the English Law. When the advance is made by cheque, it is deemed to be made when the cheque is presented at the lender's bank and *cash*ed, and not when it is given; and the reason for the law is that if the loan was considered as made when the cheque was given, the lender might sue for it at once before the cheque was presented, and on presentation the cheque might be dishonoured—*Garden v. Bruce*, (1868) L.R. 3 C.P. 300.

59.—For money lent Three When the loan is made.
under an agree- years.
ment that it shall
be payable on
demand.

See notes under Art. 60.

358. **Loan** :—Where one person acts as managing agent of two companies, and uses money belonging to one principal for the benefit of the other principal, without the knowledge of either of them, there is no advancing of loan by one principal to the other, and a suit by one company

to recover the money from the other does not fall under this Article. For a loan to come into existence, there must be a borrower and a lender; but here the lender and the borrower being the same person, no loan came into existence—*Jaunpur Sugar Factory v. Upper India Rice Mills*, A.I.R. 1927 All. 173, 98 I.C. 1010. The words "on demand" have been used in this Article in the legal sense of the term, i.e., *forthwith* and without demand—*M. Chetty v. Palaniappa*, 13 Bur. L.T. 21, 57 I.C. 908. According to the Law of England, when money is payable "on demand" and nothing further is said, it is payable at once and without demand, and time under the statute of Limitations begins to run at once—*Jackson v. Ogg*, (1859) Johns, 397. The most common instances of the application of this principle are of money lent repayable on demand or at request, and promissory-notes payable on demand. This principle has been applied under Arts. 59 and 73 to cases of money lent and bills of exchange and promissory-notes payable on demand—*Secretary of State v. Radhika Prosad Bapuli*, 46 Mad. 259 (288), 44 M.L.J. 685, 74 I.C. 785, A.I.R. 1923 Mad. 667.

A promise that the loan shall be payable "at any time within six years on demand" is not equivalent to "payable on demand" and this Article cannot apply—*Sanjivi v. Rama*, 6 Mad. 290

60.—For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable. Three years. When the demand is made.

The words "including money of a customer in the hands of his banker so payable" did not exist in the Act of 1877. For reason of this addition, see Note 361 below.

359. "Money" :—Specific coins, e.g., gold mohurs, entrusted to a bailee for a given purpose to be returned in specie will be treated as "money" within the meaning of this Article—*Kalyan Mal v. Kishen Chand*, 41 All. 643 (645).

360. Deposit and loan :—There is a good deal of difficulty in ascertaining whether a suit comes under Article 59 or Article 60. It is not clear what the Legislature meant by the word 'deposited' in Article 60, but there must be some difference between 'money lent' and 'money deposited'; and a plaintiff relying upon Article 60 must prove that something took place between the parties at the time the money passed which would constitute the handing over of the money a deposit and not a loan. It has been suggested that the difference between a loan and a deposit

is that the borrower who takes money on deposit stands in a fiduciary relationship to the lender. That might either arise from a direct agreement or might be implied from the circumstances in which the money came to the hands of the borrower. Ordinarily, when A hands over money to B on the understanding that it is not a gift, but has to be repaid when demanded, that would be considered in law a loan, and when the plaintiff seeks to prove that the money so handed over was a deposit, the onus would lie upon him to prove that there were additional circumstances which turned the loan into a deposit. There is no distinction in this Act between a money lent and money deposited as regards the agreement to repay; so that it is not the agreement that the money should be payable on demand that distinguishes a deposit from a loan. There must be something further proved, and it is not possible to define exactly what that something further must be—*Chintaman v. Kachubhai*, 25 Bom L.R. 503, 73 I.C. 978, A.I.R. 1924 Bom. 28. Whether the transaction is a deposit or a loan is clearly a question of fact to be decided according to the evidence in each case—*Perundevi v. Nammalvar*, 18 Mad 390 (394). If there is any doubt as to whether a transaction is a deposit or a loan, the presumption is that it is a deposit and not a loan—*Murugiah v. Pakkiri*, A.I.R. 1928 Mad 499, 107 I.C. 290.

A deposit is a loan and something more, i.e., the depositor stands in a fiduciary relation to the depositor, therefore where the plaintiff claimed to recover from the defendant, who was his grand-father, a certain sum which was the amount standing to his credit in the defendant's books, and it was found that these sums were presents which had been made to him on his birthday and from time to time paid over to the defendant by the plaintiff's mother (defendant's daughter) and that these sums were carried over from year to year in the defendant's books, the interest being added each year, it was held that the defendant stood in a fiduciary position to the plaintiff, and therefore, there was a deposit within the meaning of this Article and not a loan, and limitation did not commence to run until demand—*Dorabji v. Mancherji*, 19 Bom 352, affirmed on appeal in *Mancherji v. Dorabji*, 19 Bom 775. Similarly, where the grand-father of one P intended to make a gift to her of Rs. 1000 and in fact made the gift and asked the defendant who was a relation of his to hold the money for her and to give it to her when she attained her majority, or when she might demand it, with interest at a certain rate, it was held that the transaction was clearly in the nature of a deposit of money in the hands of the defendant, and this Article applied—*Narayanan v. Vellayappa*, 1916 M.W.N. 206, 34 I.C. 347. Where one M entrusted his nephew S, a rich money-lender, with some money for investment, and the latter accordingly first deposited the amount with a third party, but subsequently withdrew it and invested it in his own firm, there being no evidence as to the exact terms on which the money was handed over, held that the presumption was that the money was deposited on terms that it should be payable on demand and the suit for its recovery fell under this Article—*Ramanathan v. Subramanya*, 28 M.L.J. 372, 28 I.C. 688. The plaintiff from time to time kept money with the defendants for

safe custody. The defendants were at liberty to employ the money in their own business and in case they did so they were to pay a certain interest on the money so employed. *Held* that the relation between the parties was not that of lender and borrower, as the defendants did not take the money for their own benefit and did not agree to pay interest for it themselves. The transaction was in the nature of a deposit under Article 60—*Jogendra v. Dinkoo Ram*, 25 C.W.N. 981, A.I.R. 1921 Cal. 644, 66 I.C. 752. Where the plaintiff bailed 400 gold mohurs with the defendant for specific purposes, and on demand being made, the delivery was refused, it was held that the suit for the return of those mohurs or for their value was a suit for 'money deposited under an agreement that it shall be payable on demand' and that this Article governed the case—*Kalyan Mal v. Kishen Chand*, 41 All. 643, 17 A.L.J. 888, 55 I.C. 45.

361. Banker and customer :—There was a conflict of opinion as to whether the relationship between a banker and customer was that of depositee and depositor under Article 60 or of borrower and lender under Article 59. In *Issur Chunder v. Jiban*, 16 Cal. 25, and *Perundevitayar v. Nammalvar*, 18 Mad. 390, it was held that the transaction was in the nature of a deposit; but in *Ichha v. Natha*, 13 Bom. 338, *Dharam v. Ganga*, 29 All. 773 and *Chandu v. Chanda*, 95 P.R. 1885 the relationship was held to be that of borrower and lender. This conflict has been set at rest by the addition of the words "including...payable" in Article 60; so that a banker is now regarded as a depositee—*Jaggi Lal v. Kishen Lal*, 37 All. 292.

The word 'banker' in this Article does not mean a *professional* banker. It is not necessary to prove that the defendants were carrying on business only as bankers. A man might become a banker or place himself in the position of a banker with regard to a particular customer; and if the dealings between the lender and the borrower are such that the Court is satisfied that it could be said that the borrower is in the position of a banker to the lender, then the money so lent could be considered as a deposit. Where the evidence shows that the plaintiff was lending money to the defendants at a low rate of interest, and the defendants were lending out that money and other money deposited in a similar fashion at a higher rate, *held* that it was exactly in the nature of a banker's business—*Bhimanna v. Venichand*, 28 Bom. L.R. 73, 93 I.C. 215, A.I.R. 1926 Bom. 168; *Motigavri v. Naranji*, 29 Bom. L.R. 423, 102 I.C. 408, A.I.R. 1927 Bom. 362.

Money left in the hands of a trader who is not a banker, under circumstances such as would make it the money of a customer if the depositee were a banker, will be considered as a deposit and a suit to recover money so deposited will fall under this Article—*Subramanian v. Kadiresan*, 39 Mad. 1081 (1084), 30 M.L.J. 245, 32 I.C. 965. Really there is no distinction between a deposit and a loan, because they are both moneys lent by the customer to the bank, but it is necessary, for the purpose of considering whether Article 60 applies, to see whether the relationship of customer and banker arose between the parties. Where the books

of the firm began in plaintiff's favour with a balance, and the account was made up every year and interest added to it, and the balance carried forward to the next year, and it also appeared that payments were from time to time made and withdrawn and interest allowed on the said amounts and there was no period fixed for repayment of the moneys, *held* that the transaction was not a loan but a deposit, being moneys of a customer in the hands of a banker payable on demand—*Hirabai v. Dhanjibhai*, 29 Bom. L.R. 427, A.I.R. 1927 Bom. 433, 102 I.C. 145

The word 'deposit' in this Article covers all payments of the customer's moneys made to the banker which make up the credit balance in favour of a customer in the banker's hands—*Motigavri v. Naranji*, 29 Bom. L.R. 423, A.I.R. 1927 Bom. 362, 102 I.C. 408.

An overdraft in the hands of a banker is a loan and not money deposited with the banker, and Article 59 would apply to such overdraft and not Art. 60—*Motigavri v. Naranji* (supra). So also, Article 60 would not apply to a banker suing his customer on an overdraft—*Bengal National Bank v. Jatindra*, 56 Cal. 556, 33 C.W.N. 412 (417)

362. Thavanai account—The custom of *thavanai* transaction among Natukottai Chetties is that the deposit is made for a fixed and certain period of two months at the rate of interest which is fixed weekly by members of the Chetty community; the depositor cannot demand repayment before the end of two months for which he has deposited the money. If the depositor does not demand it at the end of the term, and the depositee does not elect to repay it then, the deposit is taken to be extended for another period of two months, the rate of interest to be fixed by the weekly meeting of the community, and so on until the money is repaid.

A suit for money due under a *thavanai* transaction is governed by Art. 60 or 115 (and not Art. 57). It is not clear whether the money deposited on a *thavanai* account is repayable at once upon demand, or is repayable only after the expiration of the current *thavanai* period when the demand is made. In the former case, Art. 60 would apply, and time would begin to run from the date of demand; and in the latter, time runs under Art. 115 from the expiry of the current *thavanai* period when the demand is made—*Muthia v. Ramanathan*, 1918 M.W.N. 242, 43 I.C. 972, *Vellayappa v. Unnamalai*, 1917 M.W.N. 858, 42 I.C. 573, *Annaratnam v. Annamalai*, 10 L.W. 67, 52 I.C. 456. In a Burma case, it has been held that money deposited on a *thavanai* account is not repayable until the end of the period of deposit when the demand is made, and a suit to recover money deposited on a *thavanai* account is governed by Article 60, and must be brought within three years from the time when the demand is made—*M. Chetty v. Palaniappa*, 13 Bur. L.T. 21, 57 I.C. 908. In *Chellappa v. Subramanian*, 1918 M.W.N. 564, 47 I.C. 948, it has been held that the suit is governed by Article 60 and no other, because the money deposited on the understanding that it is to be paid on demand after the expiry of a fixed period does not cease to be a deposit payable on demand within the meaning of Art. 60.

It is clear that Art. 57 cannot apply, because under that Article time runs from the date of the loan, whereas in *thavanai* accounts time runs, *ex hypothesi*, from the expiry of the *thavanai* period; besides the transaction is more in the nature of a deposit than a loan, and the Natukottai Chetties are 'bankers' within the meaning of Art. 60—*Vellayappa v. Unnamalai*, 1917 M.W.N. 858, 42 I.C. 573.

In cases of deposit on *thavanai* where the agreement is that interest is not to be paid until demanded but should be added to the principal, the whole amount being treated as a fresh deposit at the end of each *thavanai*, held that the proper Article applicable to a suit for recovery of the principal and interest is Art. 60 and not that the claim for interest is governed by Art. 63—*Narayanan v. Subbiah*, 43 Mad. 629, 58 I.C. 639.

363. "Payable on demand" :—It is not sufficient for the application of this Article that there should be a deposit; but it is also necessary for the purpose of this Article to show that the deposit was under an agreement that it shall be payable on demand. There must be evidence of such an agreement—*Ammalu v. Narayanan*, 51 Mad 549, A.I.R. 1928 Mad. 509 (511), 111 I.C. 210. Advance money deposited by the vendee with the vendor under a contract of sale is not money payable on demand, but is repayable to the vendee in the event of the vendor failing to perform his part of the contract. To a suit to recover the money Article 60 does not apply but Article 97—*Galstaun v. Sahebzadi Mamoodi*, 56 Cal. 455, 33 C.W.N. 115 (116), A.I.R. 1929 Cal. 216, 117 I.C. 700. In Article 59, the term 'on demand' is used in its legal sense, *i.e.*, forthwith and without demand; but Article 60 applies to cases of deposit of money repayable 'on demand' in the popular sense of the term *i.e.*, after actual demand is made—*M. Chetty v. Palaniappa Chetty*, 13 Bur. L.T. 21, 57 I.C. 908.

61.—For money payable to the plaintiff for money paid for the defendant. Three years. When the money is paid.

364. Contribution suits :—A contribution suit brought against the co-parceners by the managing member of a family who was compelled to pay the whole family-debt is governed by this Article—*Tirupatiraju v. Rajagopala*, 8 M.L.J. 271. Where loan is raised by one of the joint owners of an undertenure to pay off decrees for rent and revenue in arrears to save the estate from sale, a suit by him for contribution against the other owners falls within this Article—*Sukhamoni v. Ishan*, 25 Cal. 844 (851) (P.C.) A suit by the plaintiff to recover the money which he has paid in excess of his own moiety, for the expenses of certain temple held jointly by him and the defendant, which excess the defendant ought to have paid, is governed by this Article; and the fact that it may be necessary to examine certain accounts, cannot by itself render the suit one for account—*Raman Lalji v. Gopal Lalji*, 19 All 244. Under an award, the plaintiff was to clear a canal common to himself and the

defendant, and to recover a certain share of the costs from the defendant. Plaintiff cleared the canal and brought the present suit to recover from the defendant his share of the sums expended in such clearing. *Held* that the suit fell under this Article—*Tulsidas v. Wardero*, 60 I.C. 971, 14 S.L.R. 219. A suit for contribution by a partner of a firm who has paid the whole or more than his share of the amount due from all the partners falls under this Article—*Walaiti Ram v. Ram Kishen*, 5 Lah. L.J. 310, 72 I.C. 385, A.I.R. 1924 Lah 112.

The plaintiff and the defendant, who jointly owned a well, entered into a registered agreement to the effect that the necessary repairs were to be made by both the owners. In 1911 the plaintiff alone repaired the well at his own cost, and in 1916 brought a suit for contribution. *Held* that the suit was barred, under this Article; it was not covered by Article 116, because although the original indebtedness arose out of the registered contract, yet the claim upon which the action is based rests not upon the registered contract but upon the promise which the law implies on the part of the co-owners to share equally the expenses of the repairs—*Suraj Prasad v. Karamali*, 44 Bom 591 (594), 57 I.C. 532.

Charge.—As to whether the plaintiff gets a charge on the property of the defendant for the payment made on his behalf, compare the cases cited in Note 443 under Art. 99. In a recent Madras case it has been held that the plaintiff who satisfies a money-decree which was hanging over the head of the defendant, does not thereby acquire any charge on the defendant's estate, even though the money-decree might be realised in execution by sale of the immoveable properties of the defendant—*Muthuswami v. Ponnayya*, 51 Mad. 815, A.I.R. 1928 Mad 820 (822), 55 M.L.J. 436, 110 I.C. 613.

365. Other suits.—Where the contract of agency is contained in a registered deed, but the contract does not provide for any obligation on the part of the principal to indemnify the agent, a suit by the agent for recovery of money paid by him for the principal in meeting the expenses of the principal's litigation is governed by this Article and not by Article 116. The right of suit is conferred by section 70 of the Contract Act—*Kandasami v. Avayammal*, 34 Mad 167. A suit to recover revenue paid by the plaintiff while he was in possession of immoveable property under an order of Court but of which he was subsequently dispossessed by reason of the order being reversed, falls under this Article and not under Article 97, and time runs from the date of the last payment—*Alayar v. Bibi Kunwar*, 42 All. 61, 17 A.L.J. 1025, 52 I.C. 632.

Where the mortgagor leaves a specific portion of the consideration money with the mortgagee to pay off certain creditors, and the mortgagee fails to make such payments, in consequence of which the mortgagor, to save his property, makes the payment himself, a suit by him to recover the money so paid from the mortgagee falls under this Article and time runs from the date of actual payment and not from the date of the mortgage—*Sarju Misra v. Ghulam Hussain*, 63 I.C. 87 (All). Article 116 may also apply. See 19 A.L.J. 81 cited in Note 455.

Art. 116 Where a registered sale-deed provided that the purchaser

(496). See *Moses v. Macfarlane*, 2 Burr. 1005 (1010); *Morgan v. Palmer*, (1824) 2 B. & C. 129; 26 R.R. 537; *Neate v. Harding*, (1851) 6 Ex 349; 86 R.R. 328; *Biman v. Promotha*, 49 Cal. 886 (889), 36 C.L.J. 295, A.I.R. 1922 Cal. 157.

In an action for money had and received there must be privity of legal recognizable nature between the plaintiff and the defendant—*Ramasami v. Muthusami*, 41 Mad. 923. This Article applies if there exists such privity between the plaintiff and the defendant, so that the defendant may be said to have held the money in trust for the plaintiff—*Nihal Singh v. Secretary, Gurudwara*, 92 I.C. 731, A.I.R. 1926 Lah. 228.

369. Scope:—This Article would apply where the money was received by the defendant for the plaintiff himself: if the receipt had been for somebody else, whose shoes the plaintiff had stepped into, this Article would not apply—*Chand v. Angan*, 13 All 368. Plaintiff entrusted certain goods to the defendant's brother, who however appropriated the goods to his own use, and after his death the defendant also sold the goods, and held the proceeds as agent of the widow of the deceased. Plaintiff thereupon sued to recover the money from the defendant. Held that this Article did not apply, for when the defendant sold the goods, he received the money not for the use of the plaintiff, but for the use of the widow of his deceased brother. The suit fell under Article 120—*Gurudas v. Ram Narain*, 10 Cal 860 (864) (P.C.)

It was held in an Allahabad case that this Article would only apply where the amount was received for the plaintiff's use by the defendant himself; if the amount had been received by the predecessor of the defendant, this Article would not apply. Therefore a suit by the client against the pleader's legal representative, for money which had been received by the deceased pleader from Court on behalf of the plaintiff was held to be governed by Art. 120, and not by this Article—*Bindraban v. Jamuna*, 25 All. 55. But in this case the learned judges have taken no account of the definition of 'defendant' given in sec 2, which includes the defendant's legal representatives. In a recent Calcutta case it has been rightly held that a suit by the plaintiff against the pleader's son and legal representative for recovery of a sum of money received by the pleader out of Court for the use of the plaintiff is governed by this Article and not by Article 120—*Ramhari v. Rohini Kanta*, 35 C.L.J. '330, A.I.R. 1922 Cal. 499. The same view has been taken by the Patna High Court in *Rameshwar v. Narendra*, 5 P.L.T. 355, 71 I.C. 916, A.I.R. 1923 Pat. 259 (following 35 C.L.J. 330). But where the suit against the legal representative involves taking of accounts and is not a suit for a specific sum of money, Article 62 cannot apply. See *Rao Girraj Singh v. Raghubir*, 31 All 429; *Fatima v. Imtiaz*, 1 P.R. 1912, 12 I.C. 930.

370. Received:—Where a suit was brought by one co-sharer of a *jaghir* to recover his share of the net income from another co-sharer who was also appointed as the manager of the *jaghir*, held that the suit was not governed by Article 62. This Article only applies to cases where a definite sum of money has been received by the defendant and which

the law says he must hold for the use of the plaintiff; it does not govern cases where the suit is really one for *account* and it is sought to recover from the defendant not only the money which he actually received, but also moneys which he ought to have received but failed to receive for his default—*Subba Rao v Rama Rao*, 40 Mad 291 (293). Such a suit is governed by Article 120.

It is not necessary to prove that defendant *intended* to receive the money for the use of the plaintiff; whether he intended to receive the money on behalf of the plaintiff or he intended to appropriate it to his own use, this Article applies all the same if the money actually belongs to the plaintiff—*Durga Devi v. Ram Nath*, 85 P.R. 1919, 52 I.C. 580; *Lachmi v. Dhanukdhari*, 17 I.C. 351 (352); *Harihar v. Syed Mohamed*, 1 P.L.J. 374 (375), 20 C.W.N. 983, 37 I.C. 30.

This Article would apply to a suit brought by the plaintiff to recover from the defendant the money received by the latter to the plaintiff's use, even though at the time when the defendant realised the money a suit by the plaintiff to recover the money from the person originally liable would have been barred by limitation—*Mohabir Prasad v. Parsandi*, 45 All. 410, 21 A.L.J. 345, 74 I.C. 939, A.I.R. 1923 All. 532.

371. Surplus sale proceeds —A suit for recovery of surplus proceeds of a sale held for arrears of revenue wrongfully taken away by the defendant comes under this Article—*Harihar v. Syed Mohamed*, 1 P.L.J. 374 (376); *Bhagwan v. Karam Husain*, 33 All. 708 (726) (F.B.) Similarly, this Article governs a suit to recover the surplus proceeds of a sale of a *patni* tenure held for arrears of rent, which were wrongfully withdrawn from Court by the defendant—*Niranka v. Atul Krishna*, 28 C.W.N. 1009, A.I.R. 1925 Cal 67 Just after the purchase of the mortgaged property by the mortgagee, the property was sold for arrears of Government revenue; after payment of the arrears a surplus was left with the Collector, who paid it to the defendant, the previous owner; a suit by the mortgagee to recover the surplus sale-proceeds from the defendant was governed by this Article—*Lachmi v. Dhanukdhari*, 17 I.C. 351 (Cal)

But the surplus proceeds of a revenue-sale remaining in the hands of the Collector under the statutory provisions of sec 31 of Act XI of 1859, are not money had and received for the use of the proprietor of the estate; and a suit to recover the proceeds from the Collector is governed by Article 120 and not by this Article—*Secretary of State v. Guru Prasad*, 20 Cal 51 F.B. (overruling *Secretary of State v. Fazal Ali*, 18 Cal 234)

372. Suit to recover share of family property —If the members of the family are *separate*, a suit by one member to recover his share of money received by another member is governed by Article 62, even though some of the property is left joint. If, however, the family is *joint*, Article 62 cannot apply. Thus, at the *separation* of the members of a joint family, the unrealised debts as well as other properties of the

family were left undivided. The debts and the rents of the properties were subsequently realised by one or some members of the separated family. In a suit brought by the other members for their shares in the moneys so realised, it was held that this Article applied and time ran from the date of the realisation of the moneys. Article 127 cannot apply because the family is not joint—*Banoo Tewari v. Doona Tewari*, 24 Cal. 309 (315); *Ramalagu v. Solai*, 41 M.L.J. 274, A.I.R. 1921 Mad 283, 69 I.C. 274; *Arunchala v. Ramasamy*, 6 Mad 402 (403); *Vaidyanath v. Aiyasamy*, 32 Mad. 191 (196), *Thakur v. Partab*, 6 All. 442; *Gajraj v. Sadho*, 15 O.C. 397, 16 I.C. 882 (883). But if the family is joint, Article 62 is inapplicable, for until separation one tenant-in-common cannot maintain an action for money had and received against his co-tenant, for recovery of the money received by the latter in excess of his share, but can only bring a suit for account, and the only Article applicable would be Art. 120, unless an agency can be presumed in which case Article 89 will apply—*Yerukola v. Yerukola*, 45 Mad. 648 (F.B.), 42 M.L.J. 507, A.I.R. 1922 Mad. 150 (following *Thomas v. Thomas*, 1850, 5 Ex. 28 and *Subba Rao v. Rama Rao*, 40 Mad. 291); *Suraj Narain v. Narbada*, 4 Luck. 265, 115 I.C. 99, A.I.R. 1929 Oudh 83 (85), 5 O.W.N. 1122. Until there has been a separation, one co-sharer cannot claim a share in each individual collection, nor can he claim any particular sum at the time of collection, from the defendant. All that he is entitled to is an account technically so called. The Article governing the suit is not therefore Art. 62—*Subba Rao v. Rama Rao*, 40 Mad 291 (295), 32 I.C. 899. Where the family is separate, but the whole family property is managed by one member of the family, who occupies the position of manager, the family is nevertheless a separate family, and a suit by one of the members to recover his share of the money received by the manager (defendant) is governed by Art. 62. If however the suit is framed as a suit for recovery of the money as well as for partition of the whole moveable and immoveable property of the family managed by the defendant, Art. 120 applies—*Parsotam v. Radha Bai*, 37 All. 318 (323).

If on partition of the joint family property a portion of the family property is left joint in the hands of one or some members by a family arrangement, the member or members in whose possession it is left will be agents of the other members. A suit by the other members for an account of such property (moveable) and for recovery of their shares is governed by Article 89 and not by Article 62 or 120. Limitation begins to run from the date when an account is demanded and refused, or if no demand is made, when the agency is terminated—*Gabu Naroba v. Zipru Ramsingh*, 45 Bom. 313; *Yerukola v. Yerukola*, 45 Mad. 648 (663), 42 M.L.J. 507, 71 I.C. 177; *Kishen Devi v. Banwari*, 10 Lah. L.J. 355, A.I.R. 1928 Lah. 688 (689), 111 I.C. 635. Even though there was no family arrangement, still if after partition one brother was realising the outstandings originally due to the joint family, as he had been doing before partition, there must be an implied contract of agency between him and the other brothers, and a suit by a brother to recover his share of the collections would be governed by Art. 89, and not by Art. 62 or 120.

—*Bur Chand v. Ganpat*, 30 P.L.R. 275, A.I.R. 1929 Lah. 407 (408), 116 I.C. 327.

Where a debt due to two brothers jointly was realised before partition by one brother, who afterwards fraudulently represented to the other brother's representative at the time of partition that the debt was still outstanding, a suit by the latter to recover his share of the money was governed by this Article and limitation would run according to section 18 from the time when the plaintiff was aware of the fraud—*Lakshminarasamma v. Lakshamma*, 25 M L J 531, 21 I.C. 394.

373. Suit against ex-agent :—A suit by the plaintiff against his ex-agent for money realised by the latter after the termination of the agency falls under this Article—*Hansraj v. Ratni*, 13 A.L.J. 494, 29 I.C. 986. The plaintiffs were the proprietors of a brick-making business at Muttra, where the defendant was employed as their agent. The defendant, however, in course of time started a brick-making business of his own at Brindaban close to Muttra, and all orders for bricks arriving at the plaintiffs' firm at Muttra were forwarded to and executed by the defendant's own firm at Brindaban. Thereupon the plaintiffs dismissed the defendant, and more than three years after, brought a suit against him to recover the profits made by the defendant from his brick business. It was held that the profits which the defendant made in his own firm out of the plaintiffs' firm in the manner mentioned above, and which he was bound in his capacity as agent to pay over to his employers, must be regarded as money had and received for the use of the principal; the suit was therefore barred under Art. 62. As this cause of action arises out of mixed consideration the suit may come within Art. 90; but even applying that Article, the suit is also barred, as the plaintiffs had knowledge of the defendant's misconduct more than three years before suit—*Puran Mal v. Ford*, 41 All. 635, 17 A.L.J. 805, 52 I.C. 373.

374. Suit for refund of consideration money :—Where the consideration failed *ab initio*, the transaction being in its inception void, the suit is governed by this Article and not by Article 97 which deals with suits for refund of money paid upon an "existing consideration which afterwards fails"—*Buta Ram v. Gurdas*, 44 P.R. 1918, 46 I.C. 26; *Ardeshir v. Vajesingh*, 25 Bom. 593, *Basiri Reddi v. Tallapragada*, 35 Mad. 39; *Westropp v. Solomon*, 1 D. & L. 122; *Hunt v. Silk*, 5 East, 449; *Blackburn v. Smith*, 2 Ex. 783. If there never was any consideration for the sale, then the price paid by the purchaser was money had and received to his use, and Art. 62 would apply—*Hanuman v. Hanuman*, 19 Cal. 123 (126) (P.C.). Thus, a contract of sale negotiated by a minor (the minor having settled the terms, paid consideration and received the sale-deed) is void *ab initio*. A suit for refund of the consideration money is governed by Art. 62 and not by Art. 97—*Munni Lal v. Madan Gopal*, 13 A.L.J. 185, 27 I.C. 733. Where there is a total failure of consideration with regard to a lease, a suit for refund of the consideration-money is governed by this Article and not by Art. 97—*Biswanath v. Surendra*, 19 C.W.N. 102, 29 I.C. 429. When the mortgage being void, the consideration failed *ab initio* a suit by the mortgagee

to claim repayment of money advanced to the mortgagor is a suit for money had and received, and is governed not by Art. 97 but by this Article—*Bai Diwali v. Umedbhai*, 40 Bom 614, 36 I.C. 564, 18 Bom. L.R. 773; *Javerbhai v. Gordhan*, 39 Bom. 358, 28 I.C. 442. Similarly, a suit by a lessee for a refund of part of the premium paid for a lease, proportional to the portion of the land of which possession could not be obtained by him, it having been previously leased out by the lessor to another, is governed by this Article, and not by Article 97 because the consideration failed *ab initio* in regard to that portion of the land—*Mahomed Ayub v. Elahi Baksh*, 49 I.C. 258 (Cal.).

But where the sale was valid at its date and the purchaser took possession but subsequently a judgment-creditor of the vendor sought to execute his decree against the lands and ultimately ejected the purchaser, a suit by the purchaser to recover the purchase-money is governed by Article 97 and not by this Article, because the sale being valid at its date the consideration did not fail *ab initio*, but is *subsequently* failed by reason of dispossession—*Venkatanarasimhulu v. Peramma*, 18 Mad. 173. Where a sale by a member of a joint Hindu family governed by the Mithila law went off on objection being taken by the other co-sharers when the purchaser attempted to take possession, the sale was voidable and not void, and a suit by the purchaser for recovery of money paid by him is governed by Article 97 (not by Art. 62) because there was an "existing consideration which subsequently failed" by reason of the purchaser not getting possession—*Hanuman v. Hanuman*, 19 Cal 123 (126) (P.C.) Where the plaintiff who had entered into contract with the defendant for the sale of certain property and paid earnest money, sued the defendant for specific performance of the contract, but the suit was dismissed, whereupon he again sued the defendant for the return of the earnest money, *held* that the present suit was governed by Art. 97 and not by Art. 62, because the consideration had not failed *ab initio*, but had failed *subsequently* by reason of the dismissal of the previous suit for specific performance—*Munni v. Kunwar Kamta*, 45 All. 378 (379), 21 A.L.J. 265, A.I.R. 1923 All. 321. A suit by the purchaser to recover a portion of the purchase-money on account of the vendor's failure to give possession of a portion of the lands sold, by reason of the vendor's not having any title to that portion, is governed by Article 97 and not by this Article, the sale being voidable only and not void—*Tulsiram v. Murlidhar*, 26 Bom. 750. Where the vendor sold the property in good faith believing it to be his own, and the vendee obtained possession but was subsequently ousted by the true owner, it was *held* that although the sale was void *ab initio*, still as there was good faith on the part of the vendor there was good consideration so long as the vendee remained in possession. A suit for refund of the purchase-money is governed by Article 97 and not by this Article—*Narsing v. Pachu*, 37 Bom. 538, 20 I.C. 254. According to the current of recent decisions, however, all these suits fall under Art. 116 and not under Art. 97. See Note 436 under Art. 97. Where a *patni taluq* was sold for arrears of rent, but the sale was reversed on 24th August 1905 by reason of the

Zemindar's (who brought the taluq to sale) not having the right to make the sale, and the decree reversing the sale was affirmed on appeal on 3rd August 1906, a suit brought by the purchaser in September 1908 against the Zemindar to recover so much of the purchase-money as the latter had received, is really a suit for money had and received by the defendant to the plaintiff's use, within the meaning of Art. 62 and not a suit under Article 97, because the Zemindar not having the right to bring the taluq to sale, the sale was void *ab initio*, and there was no "existing consideration" for it. The suit was time-barred, as time ran from the date of the sale. Even assuming (but not holding it to be correct) that the suit was one under Article 97, time ran from August 1905, and the suit was likewise barred—*Juscurn Boid v Prithi Chand*, 46 Cal. 670 (P.C.), 23 C.W.N. 721, 50 I.C. 444

375. Suit by one heir for money received by another :

—The plaintiff claimed as an heir to N deceased a moiety of monies which at the time of N's death were deposited with a banker, and which the defendant, the other heir of N, had wholly received from such banker; the suit was governed by this Article—*Kundun v. Bansī*, 3 All 170 A suit by persons entitled to a portion of the money left by the deceased against the holder of a succession certificate who has received the whole amount is governed by this Article—*Najmunnissa v. Amina*, 38 All 188; *Amina v. Najmunnissa*, 37 All 233, 13 A.L.J. 255, 27 I.C. 712 Where one of two brothers obtained a succession certificate in respect of certain debt due to their deceased uncle, and realised some money on the strength of the certificate, a suit brought by the widow of the other brother, who died after the certificate was obtained, for an account of all sums received by the defendant as holder of the certificate and for recovery of her husband's share, would fall under this Article—*Abdul Ghaffar v. Nurjahan Begum*, 37 All 434, *Ahidannissa v. Isuf Ali*, 50 Cal 610, 27 C.W.N. 941, 74 I.C. 1010

376. Assignment of debt :—Where the plaintiff assigned a mortgage-debt to the defendant, and the latter under colour of the assignment received money from the mortgagor, but the assignment was subsequently declared void, a suit by the plaintiff to recover from the defendant the amount received by the latter from the mortgagor fell under this Article—*Shanmuga v. Govindasami*, 30 Mad 459. Where a mortgagee assigned the mortgage for consideration, and afterwards received the mortgage-money from the mortgagor, a suit by the assignee to recover the money from the assignor (mortgagee) fell under this Article—*Sriramulu v. Chenna*, 25 Mad 396 See this case cited under Art 97 Certain G. P. Notes standing in the name of A was assigned to B, and were afterwards attached in execution of a decree obtained by A's creditors against A. B after vainly objecting to the attachment brought a suit against A and the decreeholders, to establish his right to the Notes, and was successful in that suit While it was pending, A realised interest on the Notes In a suit by B to recover the interest so realised, held that this Article applied—*Chand Mal v. Sansar*, 36 P.R. 1913, 17 I.C. 311.

377. Compensation money :—A suit against the tenant by the landlord to recover his share of compensation money awarded by Government and withdrawn by the tenant who falsely represented himself to be the real owner, falls under Art. 62 or Art. 120—*Khettar v. Dinendra*, 3 C.W.N. 202. But where at the time when the defendant (lessee) drew out the compensation money, the plaintiff had not yet established his title to the property acquired by Government but did it subsequently, the money when taken out by the defendant could not be said to have been received for the plaintiff's use, and consequently a suit by the plaintiff to recover the money from the defendant after he established his title to it does not fall under this Article but under Article 120—*Nund Lal v. Meer Aboo*, 5 Cal. 597; *Krishnan v. Perachan*, 15 Mad. 382.

378. Other suits .—Where there is a mortgage-decree, a payment made out of Court after the preliminary decree and before the final decree should be brought into account when the final decree is passed (*Sital v. Baijnath*, 44 All. 668). But if this is not done, that money becomes money in the hands of the mortgagee to the use of the mortgagor—*Mahbub Ali v. Md. Husain*, 50 All 111, 25 A.L.J. 823, A.I.R. 1927 All. 710 (711), 104 I.C. 419. A suit by the plaintiff for recovery of money received by the defendant, his co-mortgagee, in satisfaction of a mortgage in which both were interested, though the deed stood in the name of the defendant alone, is a suit governed by this Article—*Mahomed Wahib v. Mahomed Ameer*, 32 Cal. 527. Money deposited by the plaintiff with the defendant as part security for the due performance of the terms of a lease in case it should be granted to the plaintiff, may be recovered from the defendant as money received to the use of the plaintiff, when negotiations for the lease subsequently fall through—*Johury v. Thakur Nath*, 5 Cal. 830

Before the present amendment of sec. 10, a shebait of an idol was not treated as a trustee under that section; whatever sum he received for and on behalf of the idol was treated only as sums received to the use of the idol, and a suit to recover the money so received was held to be governed by this Article—*Jaisth Madhu Acharyaji v. Thakur Sri Gai Ashram*, 50 All. 265, 25 A.L.J. 1047, A.I.R. 1928 All. 134; *Rangacharya v. Ramanacharya*, 27 A.L.J. 229, 114 I.C. 734. But this is no longer good law in view of the recent amendment of sec. 10.

A suit for money received by the pleader of the plaintiffs out of Court for their use is governed by this Article—*Ramhari v. Rohini*, 35 C.L.J. 330, A.I.R. 1922 Cal 499. A suit to recover money paid by the plaintiff to the defendant by mistake in excess of the amount legally due is governed by Article 96 which specially provides for the case, rather than Article 62—*Tofa Lal v. Moinuddin*, 4 Pat. 448, 93 I.C. 129, A.I.R. 1925 Pat. 765. A suit for the recovery of money fraudulently obtained by the defendant in collusion with a third party is a suit for money received by the defendant for the plaintiff's use and governed by this Article—*Raghumani v. Nilmoni Dco*, 2 Cal 393. A suit for recovery of rent received by a joint lessor falls under this Article—*Gopal Rao v. Ambabai*, 16 N.L.R. 183, 59 I.C. 455. A suit by the real claimant against a

benamidar in whose name a bond stood and who had realised the money due upon it, is governed by this Article—*Sundar v. Fakir*, 25 All 62; *Subbanna v. Kunhanna*, 30 Mad 298; *Narayanna v. Rangasami*, 1915 M W N 215, 28 I.C. 495.

An attaching creditor is not entitled to the sale proceeds as against the holder of a decree charging the lands attached, on the ground of the priority of his attachment, if the charge had been created prior to the attachment. Where in such a case the Court had wrongly ordered the holder of the decree charging the lands to refund to the attaching creditor the sale proceeds paid to him, and he brought a suit to recover the money by the establishment of his prior right to the same, and to cancel the order of the Court compelling him to refund the money, as it was made without jurisdiction, *held* (by the majority of the Full Bench) that the suit fell under this Article, (but the other two Judges were of opinion that Art. 120 applied)—*Ram Kishen v. Bhavani*, 1 All. 333 (F.B.). "It is very doubtful whether the decision of the majority of the Full Bench in this case is correct, as the money in this case was paid under an order of a Court which was still in existence at the time of the suit"—Starling, 5th Edn., p. 255.

One B. & Co. were the managing agents of two companies J. & Co. and U. & Co. which did business other than money-lending or banking business. The money of J. & Co. was employed by B. & Co. to continue the business of U. & Co. of which the directors of either company were ignorant. *Held* that U. & Co. is liable for the money so employed, either for having received the money through their agents rightfully and applied to their purpose, or for having received it wrongfully by secret and deceitful misapplication by their agents. In the latter case, the money is recoverable as money had and received to the use of the true owner, and time begins to run from the date of actual payment—*Upper India Rice Mills v. Jaunpur Sugar Factory*, 49 All. 520 (F.B.), 101 I.C. 224, A.I.R. 1927 All. 161, overruling *Jaunpur Sugar Factory v. U. I. Rice Mills*, A.I.R. 1927 All. 173, 98 I.C. 1010.

Money paid under a void authority or under a void judgment to a person not entitled to receive it can be recovered from him by the rightful owner in an action for money had and received—*Ram Narain v. Brij Banke*, 39 All. 322 (331). Where in execution of a decree a certain debt is attached and the amount of the debt is paid by the debtor into Court and received by the decree-holder, a suit by the claimant of the debt against the decree-holder is governed by Art. 62 or 120—*Yellammal v. Ayyappa*, 38 Mad. 978. In execution of a decree against A, certain money due to A was attached. Before that date, A had transferred his property to B and the money was legally due to B. The debtor of A paid the money to the bailiff, who deposited it into Court, and it was paid to A's decree-holder. Subsequently B brought a suit for the recovery of the money within three years of the date when it was paid. *Held* that this Article governed the suit and not Art. 29, since the suit was one for money had and received for the plaintiff's use—*Naidar v. Ganga*, 38 All. 676.

A decree held by the plaintiff was sold in execution of a decree against him. The auction-purchaser realised the amount of the decree he purchased; but subsequently the sale was set aside. The plaintiff sued the auction purchaser for the recovery of the money realised by him under the decree; *held* that the suit was not one for damages, but was one for money payable by the defendant for money received by the defendant to the plaintiff's use, and fell under this Article—*Bhawani v. Rikhi Ram*, 2 All. 354. Where a mortgaged property was sold for arrears of revenue and the surplus sale-proceeds were withdrawn by the mortgagor from the Collectorate, a suit by the mortgagee to recover his mortgage-money out of the sale-proceeds is governed by either Article 132 or 120, but not by Article 62 or 97—*Kamala Kanta v. Abdul Barkat*, 27 Cal. 180.

A suit by the plaintiff to recover his share of a Government allowance received by the defendant is subject to the limitation of three years under this Article—*Chamanlal v. Bapubai*, 22 Bom. 669; *Baoji v. Balu*, 15 Bom. 135. Where a Municipal Board has assessed taxes on plaintiff's goods at a higher rate than that sanctioned by the Government, a suit for refund of the amount realised over and above the sanctioned rate would fall under this Article—*Rajputana Malawa Railway Stores v. Ajmere Municipal Board*, 32 All. 491. Where the price of a consignment of goods was paid by the plaintiff in advance on 15th November, but when the goods were delivered on 22nd November, certain of the goods were found missing, and then the plaintiff sued for recovery of the sum overpaid, *held* that limitation ran from the failure of consideration *i.e.*, 22nd November, the date when the short-delivery took place, and not from 15th November, the date when defendant received the money—*Atul Kristo v. Lyon*, 14 Cal. 457 (460). But it is curious that in this case the Judges held that Art. 62 was applicable while they computed the period of limitation from the date of "failure of consideration" using the language of Article 97.

A suit to recover money under section 73 (2) C. P. Code, on the ground that the plaintiff and not the defendant was entitled to receive the same in proceedings in execution of a decree for rateable distribution, is governed by Art. 62, and not by Art. 120, the cause of action arising on the date of the wrongful payment to the defendant—*Bajinath v. Ramadoss*, 39 Mad. 62; *Vishnu v. Achut*, 15 Bom. 438.

Disputes having arisen between the heirs of one G, deceased, the defendant was appointed to sell his stock-in-trade and pay up the creditors pending certain arbitration proceedings. The defendant sold certain property and paid up certain debts. The arbitration proceedings fell through. In a suit brought by G's sister for recovery of her share, *held* that this Article applied—*Masihuddin v. Imtiazunissa*, 37 All. 40. On a dispute between owners of contiguous properties, some lands were attached under section 146 of the Criminal Procedure Code and the income was deposited in the collectorate. Thereupon several suits were instituted by the defendant (one of the owners) for the establishment of his right and the dispute was then compromised. In the meantime, the defendant withdrew a portion of the money alleging that it represented his share of the profits,

whereupon the other owner sued him for the recovery of that money on the ground that the lands attached belonged to him. *Held* that the suit was not governed by article 62. The defendant when he withdrew the money from the collectorate took the money as owner, and had good reason for believing at the time that the money was really his; it could not therefore be said by any process of reasoning that the defendant received the money for the use of the plaintiff. The suit fell under Article 120—*Anantram v. Hem Chandra*, 50 Cal 475, 72 I.C. 1041, A.I.R. 1923 Cal. 379. Where an association not having been registered, the members brought a suit against the promoter for repayment of their subscriptions by converting the property of the association into cash, *held* that the suit was not governed by Art 62, because the money (subscription) when it was received by the promoter was not received by him for the plaintiffs' use, but was received for other specific purposes (*viz* to start a business), and became payable to the plaintiffs to the extent to which it is payable (after paying off all debts), by reason of happening of subsequent events, *viz*. failure to register the partnership as a company. The suit is, though not in form, in substance a suit for an account, governed by the residuary Article 120—*U Sein v. U Phyu*, 7 Rang. 540, A.I.R. 1930 Rang 21 (25, 27), 120 I.C. 902. A debt due to K from B was attached before judgment in a suit by V. K was thereafter adjudged an insolvent. The attached debt was paid into Court and the Official Receiver of K's estate claimed the money and applied to the Court for the payment of the money to him and not to V, by virtue to sec 34 of the Prov. Ins. Act (1907) The application was dismissed and the amount was paid to V. The Official Receiver then filed a suit to recover the money from V. *Held* that this Article applied and not Article 11—*Official Receiver v. Veeraraghavan*, 45 Mad 70 (see this case cited under Article 11)

63.—For money payable for interest upon money due from the defendant to the plaintiff. Three years. When the interest becomes due.

379. A suit by the depositor against a banker for the difference between the higher rate of interest claimed by him and the lower rate paid by the banker is governed by this Article—*Makundi v. Balakishen*, 3 All 328. This Article applies where the interest is actually payable. If in a *thavanas* transaction money is deposited with the understanding that at the end of each *thavanas* period the interest for that period is *not to be paid* but is to be added to the principal, and both are to be treated as a fresh deposit, a suit to recover principal and interest is governed by Article 60. The claim as to interest will not be treated as falling under Article 63—*Narayanan v. Suppia Chetty*, 43 Mad 629, 28 M.L.J. 417.

Where a mortgagee, not being entitled to claim *post diem* interest as such under the mortgage, claims such interest by way of damages for the

non-payment of the mortgage-money, such a claim is governed by Article 116 of the Limitation Act—*Mathura v. Narindar*, 19 All. 39 (P.C.). See also *Gudri v. Bhubaneswari*, 19 Cal. 19, and *Mati v. Ramhari*, 24 Cal. 699 (F.B.) cited under Art. 116

- 64.—For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them. Three years. When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.

380. Account stated :—An account is said to be stated only when there have been *reciprocal* demands between the parties and the balance struck then becomes the consideration for the discharge on either side. Such an account stated amounts to a new contract and is a substantive cause of action—*Ishar Das v. Harkishan*, 1916 P.W.R. 148, 35 I.C. 577. A mere statement of the balance which is due on a particular date cannot be called an account stated within this Article. An account stated is a transaction in which several cross items are set off one against the other and the balance is struck in favour of one of the parties. In such a case, the law implies a new promise by the other party to pay the balance in consideration not merely of past debts, but also of the extinguishment of the old debts on each side, and hence it is not necessary that the balance should be struck within the period of limitation applicable to any of the items in the account—*Suraj v. Bourke*, 5 P.L.J. 371 (372), following *Hargopal v. Abdul*, 9 B.H.C.R. 429. In other words, an account stated, signed by the defendant, will be the basis of a suit, even though at the date of the statement some of the items adjusted are barred by the ordinary rule of limitation.

The bare striking of a balance consisting largely of barred debts in the defendant's account book in the plaintiff's handwriting which is not signed by the defendant and which does not contain words acknowledging liability by the defendant or stating account on his behalf, is neither an acknowledgment under sec. 19, nor an account stated under Art. 64, nor a promise to pay under sec. 25 (3) of the Contract Act—*Gulzari Mal v. Kishan Chand*, 132 P.R. 1907.

In an account stated it is necessary that there should have been reciprocal demands between the parties. Therefore when a sum of money was deposited with the defendant's firm, and long after a suit for the money was barred by limitation, a balance was struck calculating the amount of interest and principal, and was signed by the defendant, acknowledging the same to be "due for balance of old account," it was held that the transaction did not amount to an account stated as there was no reciprocal demand, but was only an acknowledgment, which, as the suit had then long been barred by limitation, was of no avail—*Nahanibai v Nathu*, 7 Bom 414 Where there are no cross demands to be set off against each other, but the account consists merely of debts on one side of the account and payments made by the debtor on the other side, the account is not mutual Hence a mere acknowledgment signed by the debtor showing a balance standing against him on such an account is not an account stated So, a *khata* consisting of one item on one side only and bearing the mark of the debtor, is merely an acknowledgment and not an account stated—*Tribhovan v Amina*, 9 Bom 516 Where the defendant after having examined the accounts acknowledged the balance due by him and signed the entry of the same in the defendant's account-book, it was held that the acknowledgment being a mere acknowledgment of a balance struck, and the account not mutual, there was neither an account stated to which Art. 64 applied, nor an evidence of a new contract which could be the basis of a suit—*Ganga v. Ram Dayal*, 23 All 502, *Shankar v Mukta*, 22 Bom 513. *Chithas* having no reciprocal debts and credits but consisting of only one-sided debts all of which were taken by the defendants from the plaintiff cannot be said to be accounts stated Each of the items is a separate debt in itself and each of them will be barred in different dates—*Deoraj v. Indrasan*, 8 Pat 706, A.I.R. 1929 Pat 258 (260). The striking of a balance in an account, the items of which are all on one side, does not amount to an account stated—*Jamun v Nand Lal*, 15 All. 1

In other words, where the account is not mutual, an acknowledgment by the debtor in the account-book of his creditor, is not an account stated within the meaning of this Article. If it were, then the provisions of sec. 19 (which requires the acknowledgment to be made before the expiry of the period of limitation of the suit) may be evaded, for it would be unnecessary to inquire whether the acknowledgment was made before the expiry of the period Therefore in cases where the account is not mutual, Article 64 must be read with sec. 19, and this Article would be inapplicable except where at the time of stating the account all the several items of the account were unaffected by limitation See U. N. Mitra, 5th Edn, p. 953, Rustomji, 3rd Ed, p. 343 This is the gist of the rulings cited above But the Calcutta High Court has in a Full Bench case assumed that Art. 64 applied to accounts stated, even if there were no reciprocal or cross demands—*Dukhi v Mahomed*, 10 Cal 284 (F.B.) The same opinion was expressed in a Madras case—*Manjunatha v. Devamma*, 26 Mad. 186. So also, according to the Lahore High Court, in a case of accounts stated, it is unnecessary to decide whether there

were reciprocal demands between the parties. Such a question arises under Art. 85 and not under Art. 64. If the accounts have been adjusted and the balance struck, and the statement of account has been examined and accepted by the defendant, and signed by him, the requirements of Art. 64 are complied with. The acceptance of the account amounts to an acknowledgment of liability, and according to the Privy Council ruling in *Maniram v. Seth Rupchand* (33 Cal 1047) an unconditional acknowledgment always implies a promise to pay and can form the basis of a suit—*Kahan Chand v. Dayaram*, 10 Lah. 745, 115 I.C. 764, A.I.R. 1929 Lah. 263 (264); see also *Fateh Mahomed v. Ganga*, 10 Lah. 748, A.I.R. 1929 Lah. 264, 115 I.C. 853; *Dalip Singh v. Jawahir*, A.I.R. 1921 Lah. 421 (422), 116 I.C. 464. In these three cases it has been said that the contrary view taken in *Shankar v. Mukta*, 22 Bom 513 and *Pala Mal v. Tulla Ram*, 119 P.R. 1908, (where it was laid down that a striking of balance by the defendant merely amounted to an acknowledgment of liability and not a promise to pay so as to constitute the basis of a suit) must be deemed as overruled by the above Privy Council case (33 Cal. 1047). See also *Chunilal v. Lxman*, 46 Bom. 24 (28), A.I.R. 1922 Bom 183, where 22 Bom. 513 is held to be no longer good law. Where in consequence of default in the payment of rent, an adjustment of account was entered into between the landlord and the tenant, and a balance found to be due from the tenant, it was held that an action to recover such balance with interest was not a suit for arrears of rent, but one for the recovery of money on account stated governed by the provisions of this Article—*Dolee v. Goor*, 24 W.R. 218. Where money is placed on deposit with another person, who after some time submits accounts showing a credit balance in hand, the transaction is really a deposit (Art. 60) and the statement of accounts will not alter its nature and bring the case under the present Article—*Lazarus v. Krishna Chunder*, 28 Cal 393. The parties who were partners in certain business had gone into the accounts of the partnership and as a result of the scrutiny an entry was made in the plaintiff's *bahi* signed by the defendant, which ran as follows:—"After the scrutiny of the accounts of this firm I have struck a debit balance against me of Rs. 4017 on account of losses and advances of every kind." The plaintiff sued the defendant for recovery of the sum on the basis of the entry. Held that the entry being an account stated between the parties, the suit was governed by Article 64 and not by Art. 106—*Nand Lal v. Partab Singh*, 3 Lah 326, A.I.R. 1922 Lah. 425, 69 I.C. 502; *Jai Ram Singh v. Sardari Mal*, 29 P.L.R. 219, 108 I.C. 600, A.I.R. 1928 Lah. 459 (460). In a suit by a commission agent, if it is found that the accounts were stated and balance struck, the proper Article applicable is Art. 64 and not Art. 85—*Karam Chand v. Dayanand*, A.I.R. 1928 Lah 51 (52), 100 I.C. 874.

Where accounts have been taken from the agent and adjusted and a specific sum has been found due from the agent to the principal, the latter becomes entitled to sue forthwith for recovery of that money. A suit to recover the money is governed by Article 64 or 115, and not by Article 89 because that Article refers to a suit in which accounts have to

be taken and not a suit where an account has been rendered—*Kesho Proshad v. Sarwan Mal*, 25 C L J. 335, 40 I.C. 359.

381. "Signed" :—This Article does not apply unless the account stated is in writing and signed by the defendant—*Dakhi v. Mahomed*, 10 Cal. 284 F.B. (overruling *Shaikh Akbar v. Shaikh Khan*, 7 Cal. 256); *Murugappa v. Vyapuri*, 32 M.L.J. 536, 38 I.C. 227; *Thakurya v. Sheo Singh*, 2 All 872; *Zulfikar Hussain v. Munna Lal*, 3 All. 148 (F.B.). An account stated which is signed by one of several partners is binding on all—*Manjunatha v. Devamma*, 26 Mad 186. See sec. 251, Contract Act. If the account is not signed as required by this Article, the plaintiff can only succeed in respect of such items as are within the ordinary period of limitation—*Thakurya v. Sheo Singh*, 2 All 872.

Starting point of limitation —The period of limitation runs when the accounts are stated and balance struck. But if the balance becomes an item in a new account, that is, if after an account stated the balance appearing due on it to either of the parties is not paid but is afterwards thrown into a new account between the same parties, it passes out of the operation of the statute of limitation—*Farrington v. Lee*, (1677) 1 Mod. 270.

<p>65.—For compensation for breach of a promise to do any- thing at a specified time or upon the happening of a specified contin- gency.</p>	<p>Three years. When the time specified arrives or the contingency happens.</p>
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382. Cases :—A verbally became surety upon a bond executed by B for re-payment in May 1872, to the plaintiff, of certain advances, promising, "if B does not pay eventually (*shesh porjuntio*) I will." Default was made, and in April 1878 the plaintiff filed a suit against both B and A, which was clearly barred against B. It was held that the words "*shesh porjuntio*" could not be taken as limited to the time specified in the bond, and that the lower Court, in order to determine whether the suit was barred against A, must find upon the evidence when a demand was made upon him for payment, and then apply this Article—*Bishumber v. Hungsheshur*, 4 C L R 34. In case of a promissory note payable on demand, the cause of action against the surety arises on the same date on which it arises against the principal debtor, viz. the date of the pro-note. The surety is not entitled to any further notice—*Brojendra Kishore v. Hindusthan Co-operative Insurance Society*, 44 Cal 978, 21 C W N 482; *Raja Sreenath v. Raja Peary Mohan*, 21 C W N. 479, 39 I C 205. Where a deed of further charge provided that without payment of money due under it the mortgagor will not be entitled to redeem the property mortgaged, and the mortgagor paid off the mortgage amount without paying

the further charge, held that a suit for recovery of the further charge fell under Art. 65, and time ran from the date of redemption of the principal mortgage—*Brahmajit v. Dwaraka*, 3 O.W.N. 976, A.I.R. 1927 Oudh 53. Where a bond executed by the defendants contained a covenant that money would be paid either on a certain date, or in the event of default, on the date when a certain mortgage (executed by the defendants in favour of the plaintiff) would be redeemed, it was held that the cause of action for a suit to recover money due under the bond arose when the mortgage was redeemed without satisfying the bond—*Mahabir v. Durbijai*, 8 A.L.J. 233, 9 I.C. 482. Where there was an agreement by the vendor to refund purchase-money in case of land proving deficient, and the land actually proved deficient, a suit for refund of the purchase-money was a suit governed by this Article; if the sale-deed was registered, by Art. 116—*Kishen v. Kinlock*, 3 All 712. The defendants sold by registered sale deed their shares in certain land to the plaintiff and had agreed that if the land sold should not fall to their share in the partition proceedings which were then pending, they would pay compensation. The vendors were allotted at partition a less area than the area sold to the plaintiff, and compensation was claimed accordingly. Held that the suit fell under this Article read with Article 116, and time ran from the date of the order of the Revenue Officer passed in the partition proceedings—*Rukhan Din v. Hassan Din*, 72 I.C. 897, A.I.R. 1923 Lah. 23. A suit by the mortgagor against the mortgagee to recover the balance of the consideration payable by the latter to the former together with damages for non-payment of the amount in time is a suit governed by Article 65 read with Article 116 (the mortgage being registered)—*Naubat v. Indar*, 13 All 200 (204). When grain is advanced to the defendant on a contract that it should be repaid in kind, a suit against the defendant for compensation for not having fulfilled the promise falls under Article 65 or 115, but not under Art. 52 or 120. Article 52 refers only to those cases in which the contract is to pay for the price of the goods in money and not in kind—*Md. Din v. Sohan Singh*, 4 Lah L.J. 268, 65 I.C. 691, A.I.R. 1922 Lah. 271; *Mengha Ram v. Hassu*, 41 P.R. 1918, 49 I.C. 231; *Labh Singh v. Rur Chand*, 4 Lah L.J. 64, A.I.R. 1922 Lah. 122. Where the promisor before the arrival of the specified time intimates his intention of not performing his promise, still limitation will not commence to run until the specified time arrives—*Mansuk Das v. Rangayya*, 1 M.H.C.R. 162.

66.—On a single bond Three The day so specified.
 where a day is years.
 specified for pay-
 ment.

383. Single bond :—"A bond merely for the payment of a certain sum of money without any condition in or annexed to it is called a simple or single bond. The term 'single bond' is sometimes used to signify a bond given by one obligor as distinguished from one given by two or more"—Halsbury's Law of England, Vol. III, p. 80. In *Nihal Chand v. Khuda Baksh*, 76 I.C. 150, A.I.R. 1924 Lah. 534, a bond

executed by two persons (viz. principal debtor and surety) was held to be a single bond under this Article. The expression 'single bond' means a bill or written engagement for the payment of money, without alternative condition or a penalty attached—*Lachman v Kesri*, 4 All. 3; *Gurditta Mal v. Pal Singh*, 26 P.R. 1892; *Harilal v. Thamman*, 26 O.C. 121, 70 I.C. 85, A.I.R. 1923 Oudh 19.

Where in a debt-bond the debtor stipulated that if the principal and interest be not paid up at the specified period, the creditor would be at liberty to recover the amount by instituting a suit, "from my moveable and immoveable property, my own milk," it was held that the language was too vague to warrant the inference of the creation of a mortgage, and that the instrument was no more than a simple bond to which Art. 60 applied; if such instrument was registered, Art. 116 would apply—*Collector of Etawah v. Beti Maharani*, 14 All. 162 (164). The liability of the surety being co-extensive with the liability of the principal, a suit on a bond executed by the principal debtor and surety, against both of them, falls under this Article, and limitation runs as regards both from the date fixed for payment—*Nihal Chand v. Khuda Baksh* (supra).

It has been observed by the Privy Council that where a mortgagee sues on a personal covenant contained in the mortgage making the mortgagor responsible for any deficiency in the realisation of the mortgage-debt out of the mortgaged properties, the claim is governed by the three years' rule of Art. 66, and not by the 12 years' rule under Article 132—*Ganesh Lal v. Khetramohan*, 53 I.A. 134, 5 Pat. 585 (P.C.), 31 C.W.N. 25 (31), A.I.R. 1926 P.C. 56, 95 I.C. 839. But it has been pointed out by the Madras High Court (as well as by other High Courts) that it is not clear whether the mortgage in this Privy Council case was properly and validly registered, and it was not necessary for their Lordships to decide whether the three years' rule (Art. 66) or six years' rule (Art. 116) applied, as the suit was barred in either case, having been brought 10 years after the date of the mortgage. If the mortgage is validly registered, the suit on personal covenant would be governed by the six years' rule of Art. 116—*Chengalamma v. Veeraraghava*, 55 M.L.J. 506, A.I.R. 1928 Mad. 1124 (1126), 114 I.C. 340. See Note 483 under Art. 116.

384. Specified date—Where the bond stipulated for payment within two years or on certain contingencies, the case was not one under this Article as no particular day was specified for payment—*Gauri v. Surju*, 3 All. 276. But in *Narain v. Gouri Persad*, 5 Cal. 21, where a bond provided that the principal should become due within a certain specified time, e.g., within 6 months from the date of execution, it was held that the last day of the six months from the date of execution of the bond was to be regarded as the "day specified" under this Article, and a suit brought within 3 years from that day was not barred. The same view has been taken in *Gaya Prosad v. Sher Ali*, 15 A.L.J. 313, 39 I.C. 574; *Sham Lal v. Tehariya*, 18 A.L.J. 476, 58 I.C. 278. But where under a bond power is given to the creditor to demand the whole

of the money due under the bond whenever default is made in payment of the interest for any two years consecutively, it is impossible to predicate of the bond that there is any certain day 'specified' for payment within this Article. The bond falls under Art. 80—*Hori Lal v. Thamman Lal*, 26 O.C. 121, 9 O.L.J. 416, A.I.R. 1923 Oudh 19.

67.—On a single bond, Three The date of executing where no such day years. the bond. is specified.

385. Where a deed provided that if the obligee desired to recover his money, he should be at liberty to realise it whenever he wished, it was held that for the purpose of limitation, money became due immediately upon the execution of the bond—*Gajraj v. Raghubar*, 18 O.C. 86, 27 I.C. 540. If a house is mortgaged, while under attachment, the mortgage is void altogether, under sec. 64, C. P. Code, and a suit to enforce the personal security is governed by Article 67. Article 97 does not apply to the case, as the consideration failed *ab initio*—*Ghulam Murtaza v. Fazal, Ilahi*, 27 P.L.R. 801, A.I.R. 1927 Lah. 101.

68.—On a bond subject Three When the condition is to a condition. years. broken.

386. A suit against the administrator and his sureties on a bond executed under sec. 78 of the Probate and Administration Act is governed by this Article—*Ramanathan v. Rangammal*, 17 M.L.T. 61, 27 I.C. 849; *Ahmed v. Fatima*, 8 Bur. L.T. 59, 26 I.C. 505. But in *Kanti Chandra v. Ali Nabi*, 33 All. 414 (420), 8 A.L.J. 199, 9 I.C. 935, and *Ko Pu v. Ma Thein*, 12 Bur. L.T. 225, 56 I.C. 968, the Judges are of opinion that a suit of an administration bond is governed by Article 120.

An administration bond is a bond 'subject to a condition' within the meaning of this Article, and where the bond contains several conditions, and a suit is brought for breach of one of the conditions, it must be filed within three years of that breach. The breach of each condition gives rise to a separate cause of action, and time begins to run from the date of the particular breach giving rise to the suit—*Maung San v. Maung Kyaw*, 1 Rang 463, 76 I.C. 802, A.I.R. 1924 Rang. 68. Ordinarily, the administrator's work may be said to be completed when he files his final accounts, showing how he has dealt with the estate, and these accounts have been accepted by the Court; limitation will then begin to run. But it very often happens that there is litigation pending against the administrator, and in such a case the administrator (and consequently his sureties) cannot be absolved until the close of the litigation. If a decree is passed against him in that litigation, he is bound as administrator to pay money or deliver property as the case may be, and failure in this respect is a breach of the bond. Limitation runs from the date of this breach—*Ibid.* In cases where the administration bond contains successive covenants, each breach gives a separate cause of action; but the date of the last breach is the starting point of limitation in a suit on

the bond when the bond is conditioned on the performance of several acts, and the obligation to pay is enforceable till the last of the conditions has been fulfilled—*Ramanathan v. Rangammal*, (supra). A bond executed by the guardian under sec 31 of the Guardians and Wards Act, is a bond 'subject to a condition' under this Article, the condition of the bond being that the guardian shall render accounts and shall pay the balance found due by him from time to time—*Krishna Chettiar v. Venkatachalapathi*, 42 Mad. 302 (309). A suit to recover a penalty imposed under section 165 of the Madras Local Boards Act (V of 1884) is governed by this Article—*Kundapur Taluq Board v. Lakshmi Narayana*, 17 M L J 537.

- 69.—On a bill of exchange or promissory note payable at a fixed time after date. Three years. When the bill or note falls due.

387. M, on the 12th October 1855, drew a bill of exchange, payable three months after date in favour of B, which was accepted by J. Before the bill became due, B endorsed it to P, who again endorsed it for full value to MB and Co of which firm ML was a partner. MB and Co discounted the bill with G who presented it at maturity to J, who dishonoured it. G thereupon sued ML and obtained a decree, which ML satisfied. ML thereupon brought the present suit, on the 18th February 1865, against J, as the acceptor of the bill, for the amount he paid under G's decree. It was held that the bill was barred, the plaintiff's cause of action having accrued when the bill became payable and the acceptor refused to pay—*Mohendra v. Jadub*, 14 W R O C 5.

- 70.—On a bill of exchange payable at sight, or after sight, but not at a fixed time. Three years. When the bill is presented.

- 71.—On a bill of exchange accepted payable at a particular place. Three years. When the bill is presented at that place.

- 72.—On a bill of exchange or promissory note payable at a fixed time after sight or after demand. Three years. When the fixed time expires.

73.—On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue. Three years. The date of the bill or note.

388. The words "on demand" have been used in this Article in the sense in which they have been interpreted in English Common Law, *i.e.*, at once and without demand—*Secretary of State v. Radhika Prasad Bapuli*, 46 Mad. 259 (288, 289). A promissory note payable 'at sight' is a promissory note payable 'on demand' and is governed by this Article—*Durga Prasad v. Kalicharan*, 40 C.L.J. 84, A.I.R. 1924 Cal. 1065, 84 I.C. 475. A promissory note payable at any time within six years on demand is not governed by this Article but by Art. 120—*Sanjivi v. Kama Erappa*, 6 Mad. 290. But, it is submitted, the case would fall under Art. 80, which is the residuary Article in respect of *promissory notes*.

389. **Postponing right to sue** :—Where a promissory note was accompanied with a letter in which the debtor stated that he would pay the principal and interest within one year, *held* that the letter amounted to a writing postponing the right to sue within one year, and that limitation would not run till at the expiration of the period mentioned in the writing, and the suit was governed by Art. 80, and not by this Article—*Jwala Prasad v. Shama Charan*, 42 All. 55. Where the defendant executed a promissory note to the plaintiff payable on demand, and on the same date gave a writing to the effect that "ten months' *thavanai* (time for payment) from the date of the pro-note has been fixed for this note," it was held that the pro-note was accompanied with a writing postponing the period of payment; consequently Article 73 did not apply but Article 80, and time began to run from the expiry of the period mentioned in the writing—*Annamalai v. Velayuda*, 39 Mad. 129 (F.B.) overruling *Simon v. Hakim Mahomed*, 19 Mad 368 and *Somasundaram v. Narasimha*, 29 Mad. 212. A promissory note payable after six months whenever the plaintiff shall demand the same, is a promissory note payable on demand with the right to sue restrained for six months, and limitation consequently begins to run on the expiry of the six months from its date—*Jeaunnissa v. Manekji*, 7 B.H.C.R. 26.

74.—On a promissory note or bond payable by instalments. Three years. The expiration of the first term of payment as to the part then payable; and for the other parts, the ex-

piration of the respective terms of payment.

389A. Where a bond stipulates that the principal amount thereunder would be back within a fixed period (e.g. 18 years) and the entire principal amount is divided into instalments payable annually and provision is also made for payment of interest, the bond is one payable by instalments, and as the bond contains no stipulation that if default be made in payment of one instalment, the whole sum shall be due, the case is governed by Art. 74, and not by Art. 75; the cause of action in respect of each instalment in default would arise on the date of the default. Consequently, the plaintiff can recover only those instalments which fell due within three years before suit—*Gaura v Ram Charan*, 4 Luck 480, 4 O.W.N. 207, 100 I.C. 655, A.I.R. 1927 Oudh 539

<p>75.—On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.</p>	<p>Three years. When the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.</p>
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390. Scope:—This article is applicable only to suits on bonds and promissory notes payable by instalments, and not to applications for execution of a decree payable by instalments—*Ugra Nath v. Lagonmani*, 4 All 83. The applications are governed by Art. 182 (7).

This Article does not apply to a suit brought on a verbal contract—*Koylash Chander v. Baykoonta*, 3 Cal. 619

391. Bond payable by instalments:—A covenant for payment of interest by instalments does not bring a bond under this Article. Thus, where by a bond the principal lent was payable within a fixed time, but the interest was made payable half-yearly, held that this was not a bond payable by instalments—*Ball v Stowell*, 2 All 322; *Shib Dayal v. Meherban*, 45 All 27 (41), A.I.R. 1923 All 1, 69 I.C. 981; *Narain v Gouri Persad*, 5 Cal 21. Even if the bond provides that on default of payment of any instalment of interest the whole amount of principal would be payable at once, the case would not fall under this Article but under Article 66. Thus, where money lent on a bond was made payable on a certain date, viz., 28th May 1874, subject to the payment of interest every month and it was provided that if any monthly payment of interest should remain unpaid it should be lawful for the creditor immediately to call in and demand payment of the principal and interest, it was held

that the cause of action accrued on the due date of the bond, *i.e.*, 28th May 1874, and not on the date when the first unpaid instalment of interest became due—*Narain v. Gouri Pershad*, 5 Cal. 21. But where a bond provided that the obligee should be put in possession of land, and out of the produce thereof pay himself certain sums annually, and the balance to the obligor, and that if the obligee's receipts of produce should in any way be interfered with, the obligor should pay certain sums annually, it was held that this was a bond payable by instalments—*Ramchandra v. Gokalgi*, 1877 P.J. 309.

392. Option to sue for the whole amount—Election or waiver of option :—Where the bond provides that on default of payment of one instalment the entire amount shall become due, the creditor is at liberty either to sue for the whole amount as soon as a default is made, or to waive the provision and bring a suit for recovery of each instalment as it falls due (*i.e.*, for recovery of those subsequent instalments as are not barred at the date of the suit). This is borne out by the third column of this Article. If the creditor elects to sue for the whole amount, the period of limitation runs from the date of the first default; but if he chooses to sue for the instalments that are not barred at the date of the suit, the period is to be counted from the date on which each of those instalments falls due—*Ajudhia v. Kunjal*, 30 All. 123 (124); *Amolak v. Baijnath*, 35 All. 455 (458); *Mohan Lal v. Tika Ram*, 41 All. 104 (107), 47 I.C. 926, 16 A.L.J. 929; *Rajaram v. Narain*, 22 N.L.R. 126, A.I.R. 1927 Nag. 28. But if the creditor sues to recover the whole amount, and the claim is found to be barred by reason of the suit not having been brought within three years of the date of the default, the plaintiff cannot be allowed to fall back upon the claim to recover the instalments that fell due within three years before suit—*Sarat Lakshi v. Narendra*, 33 C.W.N. 250 (252), A.I.R. 1929 Cal. 292.

The rule of law prevailing in England is contained in *Hemp v. Garland*, (1843) 4 Q.B. 419; 62 R.R. 423 (426), where Lord Denman C. J. observes :—"If the plaintiff chose to wait until all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant who might well consider the action as accruing from the time that the plaintiff had the right to maintain it." This case was followed by the English Court of Appeal in *Reeves v. Butcher*, (1891) 2 Q.B. 509. In this case money was lent for a fixed period of five years subject to the payment of interest quarterly but it was provided that if any quarterly payment of interest should remain unpaid for 21 days after the same would become payable, it should be lawful for the plaintiff immediately upon the expiry of such 21 days to call in and demand payment of the principal and interest then due. It was held that the cause of action arose on the first default in payment of interest, and that time began to run from the earliest time at which the plaintiff could have brought his action. These two cases are accepted law in England. See *Halsbury's Laws of England*, Vol. XIX, page 44.

In some Allahabad cases it has been said that the question whether the creditor has the right to waive the penalty clause upon default and to sue for those subsequent instalments which are not barred at the date of suit, has to be decided upon a construction of the terms of the bond. Thus, where a bond payable by instalments contained a provision that upon default of payment of any one instalment it would be in the power of the creditor to sue for the whole amount due under the bond without waiting for the period provided for the payment of other instalments, it was held that this provision did not mean that the creditor would be bound to sue for the whole on default of payment of one instalment; the creditor was at liberty to waive the provision and to sue for those instalments which fell due within three years of the suit—*Ajudhia v. Kunjal*, 30 All. 123 (125); *Mohan Lal v. Tika Ram*, 41 All. 104 (106). On the other hand, a bond might be so worded as to compel a creditor to sue for the whole amount immediately if any default occurred. Thus, under an instalment bond the creditor was to recover from the debtor a sum of Rs. 11 every year for eight years, and there was a stipulation in the bond by which the obligor agreed that in case of any default in the payment of any instalment, he would pay the entire amount due on the bond irrespective of the instalments. None of the instalments were paid. The plaintiff stated in his plaint that his claim in respect of two instalments was barred by time, and that he did not want to sue for the entire sum due, and thus leaving out those two instalments, he sued for three instalments which fell due within three years before the institution of the suit. Held that the terms of the bond did not give him an option to waive the penalty clause, but compelled him to sue for the whole amount upon default and that limitation ran from the date of the first default and that the suit was barred—*Kanhai v. Amrit*, 47 All. 552, 23 A.L.J. 424, 87 I.C. 162, A.I.R. 1925 All. 499 (500). The terms of an instalment bond were that on the expiry of the term for payment of half the sum (first instalment) the creditor had a right to recover it (i.e., the amount of the first instalment) or to recover the entire amount after the expiry of the last term. Held that the bond nowhere said that in case of default of payment of the first instalment the plaintiff was entitled to recover the entire amount. The right to recover the whole amount did not accrue till after the expiry of the date fixed for the second instalment. And if he brings his suit within three years of the time fixed for the second payment, it is within time—*Shyam Lal v. Jotia*, 23 A.L.J. 896, 89 I.C. 383, A.I.R. 1926 All. 142. But the Calcutta High Court recognises no such distinction, and lays down that if a bond provides that in case of default of payment of an instalment the creditor will be at liberty to realise the whole sum and that the debtor shall pay interest on the sum defaulted, such stipulation has the same effect as a stipulation that upon default the whole sum shall become due. The condition as to payment of interest should not be interpreted to mean that the creditor had the option either to claim at once or to wait on the chance of payment with interest. Even though the debtor pays any interest on the sum defaulted, the limitation runs from the date of the default—*Basanta*

v. *Nabin*, 53 Cal. 277, 96 I.C. 594, A.I.R. 1926 Cal. 789 (790); *Jadab v. Bhairab*, 31 Cal. 297 (299). There is no distinction between a bond in which it is provided that on non-payment of an instalment the whole amount shall become due, and a bond in which it is provided that on non-payment of an instalment the whole amount may be sued for. In both cases, limitation runs as soon as a default is made in the payment of an instalment—*Jadab Chandra v. Bhairab*, 31 Cal. 297 (300).

393. Waiver.—The word 'waiver' is not defined in this Act. But in Wharton's Law Lexicon it is defined as follows: "The passing by an occasion to enforce a legal right whereby the right to enforce the same is lost: mere lying by is not waiver for this purpose; there must be some positive act, which act if done is a waiver in law." Waiver may be express or implied; thus, where one party consents, at the request of the other, to extend the time for performance or to accept performance in a different mode from that contracted for, there is a waiver—Halsbury's Law of England, Vol. 7, p. 423. Waiver may be effected in a variety of ways and may be inferred from various circumstances. It must however always depend on some definite act or forbearance on the part of the plaintiff—*Sarat Lakshmi v. Narendra*, 33 C.W.N. 250 (252); *Abinash v. Bama*, 13 C.W.N. 1010 (1013).

Mere abstinence from bringing a suit as soon as a default is made is not sufficient to prove waiver of the condition that upon default of payment of an instalment the whole debt shall become due. The question of waiver does not depend upon the sweet will of the plaintiff—*Kanhai v. Amrit*, 47 All. 552, A.I.R. 1925 All. 499; *Abinash v. Bama*, 13 C.W.N. 1010 (1012); *Girindra v. Khir Narayan*, 36 Cal. 394; *Jadab Chandra v. Bhairab Chandra*, 31 Cal. 297 (299); *Sarat Lakshmi v. Narendra*, 33 C.W.N. 250 (257); *Chenibash v. Kadum*, 5 Cal. 97; *Sethu v. Narayana*, 7 Mad. 577; *Seshan v. Veera Raghavan*, 32 Mad. 284; *Gopala v. Paramma*, 7 Mad. 583; *Gopal v. Dhondya*, 8 N.L.R. 44, 14 I.C. 685; *Babu Ram v. Jodha Singh*, 11 A.L.J. 89, 18 I.C. 690; *Amolak v. Balj Nath*, 35 All. 455 (458); *Khairuddin v. Atu Mal*, 188 P.R. 1883 (F.B.); *Nobodip v. Ram Krishna*, 14 Cal. 397; *Kanka v. Rustomji*, 20 Bom. 109 (113); *Kimatrai v. Sher Mahomed*, 8 S.L.R. 63, 25 I.C. 938. There must be either an agreement between the parties, or such conduct as will itself afford clear evidence of a legal waiver—*Kankuchand v. Rustomji*, 20 Bom. 109. But in the following cases it has been held that abstinence from suing as soon as the default was made amounted to a waiver of the provision—*Ajudhia v. Kunjal*, 30 All. 123 (125); *Mohan Lal v. Tika Ram*, 41 All. 104 (106). Where the waiver is not express, it might be implied from conduct which is inconsistent with the continuance of the right—*Kanhai v. Amrit*, 47 All. 552, 23 A.L.J. 424, A.I.R. 1925 All. 499. Delay is not waiver; inaction is not waiver though it may be evidence of waiver. Waiver is a consent to dispense with something to which a person is entitled—*Selwyn v. Garfit*, 38 Ch. D. 284.

The mere demand of an instalment does not amount to a waiver of the right to demand the whole sum—*Kanku v. Rustomji*, 20 Bom. 109

(115). The acceptance of interest after default, in a case in which the bond provides that upon default the creditor shall be at liberty to recover the whole amount and the debtor shall pay interest on the sum defaulted, does not amount to waiver—*Basanta v. Nabin*, 53 Cal. 277, A.I.R. 1926 Cal. 789 (790).

The acceptance of an overdue instalment cannot constitute a waiver—*Mohesh v. Prasanna*, 31 Cal. 83; *Srinivas v. Sheo Govind*, 20 I.C. 156; *Balaji v. Sakharan*, 17 Bom 555; *Mumford v. Peal*, 2 All. 857. Contra—*Chenibash v. Kadum*, 5 Cal 97; *Maharaja of Benares v. Nandram*, 29 All. 431, *Jadab Chandra v. Bhairab Chandra*, 31 Cal 297 (299); *Ram Jawaya v. Ram Singh*, 2 Lah.L.J. 314. These latter decisions are in accord with the English law as laid down in *Norton v. Wood*, 1 R. & M. 178, where Lord Lyndhurst observes. "If the money be tendered after the period when it became due, and the person to whom it has been paid does not see fit to refuse it, it is a waiver of the obligation; it must be taken as a regular payment, if the person receives it the day after, without making any objection."

If the creditor pleads payment of an overdue instalment by the debtor, and the payment is found to be false, there is no waiver—*Abinash v. Bama*, 13 C.W.N. 1010 (1013). Similarly, if the creditor pleads payment of interest after default, and it is found that no interest has actually been paid by the debtor, there is no waiver. The fact of waiver would be absolutely inconsistent with the plea, when such plea of payment has been found to be false—*Sarat Lakshu v. Narendra*, 33 C.W.N. 250 (252).

In some cases it has been held that the question whether the acceptance of an overdue instalment amounts to a waiver is a question of fact to be determined by the circumstances of the case. See *Satrucharla v. Seetarama*, 3 Mad. 61, and *Kashiram v. Pandu*, 27 Bom 1 (F.B.). Thus, when an instalment is paid some days after it becomes due, and it is found that this payment is accepted as one made on account or in satisfaction of that instalment, and not as a mere part-payment in reduction of the whole debt, and that the circumstances indicate an intention to waive the forfeiture though there is no express waiver, the acceptance of the amount of that instalment constitutes a waiver within the meaning of this Article—*Nagappa v. Ismail*, 12 Mad 192

Where the plaintiff, who is entitled, in default of payment of a certain sum by the defendant, to receive a much larger sum, receives from the defendant on default being made by him a larger sum than that which was due at the prescribed time but one smaller than that which he was entitled to on default under the agreement, he cannot be said to have waived his right to the larger amount—*Nanjappa v. Nanjalla*, 12 Mad 161. If the creditor accepted several irregular payments without objection, he must be taken to have waived his right to enforce the payment of the whole amount—*Sakhawat v. Gajadhar*, 28 All 622. A consent not to sue for the bond or failure of payment of an instalment amounts to a waiver—*Ram Chander v. Rawatmull*, 19 C.W.N. 1172, 31 I.C. 672.

In the absence of waiver, if the creditor fails to sue to recover the whole amount due under the bond, upon the first default being made in the payment of an instalment, he will be debarred from bringing a suit for the later instalments which individually are not time-barred. In other words, this Article contemplates that in the absence of a waiver, an instalment bond is to be treated as a bond not permitting instalments for the purposes of limitation—*Bankey Lal v. Ram Lal*, 12 O.L.J. 112, A.I.R. 1925 Oudh 373, 86 I.C. 918.

A creditor cannot be compelled to waive the right he has acquired on the debtor's default—*Raghu v. Dipchand*, 4 Bom. 97.

394. Starting point of limitation :—The terminus a quo provided by this Article is the date of first default in the payment of an instalment, and not the date of the last payment of an instalment. Thus, where a bond was payable by instalments with a proviso that the default in payment of one or more instalments shall render the whole debt due forthwith, and the plaint recited the payment of the first two instalments and a default of the third, held that the period of limitation ran not from the date of payment of the second instalment but from the date of non-payment of the third instalment in accordance with the stipulations in the contract. The plaintiff will be required to prove the fact of default of payment of the third instalment; and he will not be required to prove the fact of payment of the second instalment with reference to the provision of sec. 20—*Nand Lal v. Akki*, 6 Lah. 163, 26 P.L.R. 328, 89 I.C. 294, A.I.R. 1925 Lah. 394. Where the plaintiff was unwilling to receive the instalments which the defendant was willing and ready to pay, it cannot be said that there was any default in payment of the instalments on the part of the defendant—*Sitharama v. Krishnasamy*, 38 Mad 374 (383)

Demand :—Where a bond stipulates for payment of a debt by instalments, and in default of payment of any one instalment, for payment of the entire sum *on demand* by the creditor, the cause of action for recovery of the entire sum would arise when *demand is made* by the creditor in terms of the stipulation; in such a case the words 'on demand' have the same meaning as "when you require" and do not mean that payment is to be made forthwith or immediately upon default—*Karunakaran v. Krishna*, 36 Mad. 66; *Hanmantram v. Bowles*, 8 Bom. 561. The insertion of these words ("on demand") in the instalment bond would imply that the parties deliberately used the expression and intended to make it a condition precedent that a demand should be made if the whole debt is to be paid at once—*Seetharama v. Muniswami*, 37 M L J. 613, 50 I.C. 87. Except in transactions connected with law merchant, the words "on demand" have meaning, and there should be a demand before the cause of action arises—*Ibid*. But when all the instalments had ceased to run, there could be no question of demand. Thus, where an instalment bond stipulated as above, and a suit was brought within three years of the date of demand, but seven years after all the instalments had ceased to run, it was held that the suit was barred—*Kaliappa v. Grigori*, 1919 M.W.N. 550, 50 I.C. 916.

395. Instalment Mortgage bond :—A mortgage bond containing a stipulation for payment by instalments falls under Art. 132—*Narna v. Amani*, 39 Mad. 981; *Lachakkammal v. Sakkaya*, 1918 M.W.N. 586, 48 I.C. 191. But, by analogy, the principal of Article 75 is applicable to cases of such bonds. In those cases, limitation will run from the date of the first default unless there is waiver—*Sitab Chand v. Hyder Ali*, 24 Cal. 281. See Note 554A under Art. 132.

Instalment decree :—See Note 719 under Art. 182.

76.—On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen. Three years. The date of the delivery to the payee.

396. The third column of this Article is based on the English case of *Savage v. Aldren*, (1817) 2 Stark 232. In this case a promissory note was given to bankers to be delivered to the payee upon his producing and cancelling another note; it was held that time did not run till the note was delivered by the bankers to the payee.

77.—On a dishonoured foreign bill, where protest has been made and notice given. Three years. When the notice is given.

78.—By the payee against the drawer of a bill of exchange, which has been dishonoured by non-acceptance. Three years. The date of the refusal to accept.

397. Where the suit is really one to recover money alleged to be due on accounts taken between the parties, the circumstance that a *hundi* and a cheque sent by the defendant to the plaintiff were dishonoured on presentation does not attract the application of this Article—*Padmalochan v. Giris Chandra*, 46 Cal. 168

79.—By the acceptor of an accommodation-bill against the drawer. Three years. When the acceptor pays the amount of the bill.

397A. Time runs only when the acceptor actually pays the amount of the bill. The acceptor of an accommodation bill of exchange has an implied engagement from the drawer that he will take up the bill at maturity and indemnify the acceptor; and there is no cause of action till the acceptor is damnified by actual payment—*Reynolds v. Doyle*, (1840) 1 M. & G 753; *Angrove v. Tippet*, (1865) 11 L.T. 708.

80.—Suit on a bill of Three When the bill, note or
exchange, promissory years. bond becomes pay-
sory note or bond able.
not herein express-
ly provided for.

398. Cases.—A suit on an unregistered bond, whereby certain moveable property in the debtor's possession was pledged as security, is governed by this Article—*Villa v. Kalekara*, 11 Mad. 153. A bond which stipulates for payment of principal within three years and of interest every half year and provides that in default of such half yearly payments of interest it shall be optional on the part of the creditor to claim full payment of the debt, is not an instalment bond under Art. 75 because a stipulation to pay interest in instalments does not bring a bond within that Article; it belongs to the category of bonds mentioned in Art. 80—*Ball v. Stowell*, 2 All 322, *Shib Dayal v. Meharban*, 45 All 27 (42) (F.B.), A.I.R. 1923 All. 1. A document which recites "I shall pay you whenever you may demand after you attain the age of majority" is a promissory note; and a suit on the note is governed by Art. 80 Limitation begins to run from the time when there was a demand after the creditor attained majority—*Kuttiassan v. Suppi*, 3 M.L.J. 199. Neither Article 78 nor Art. 69 applies to a suit based on a dishonoured hundi payable at a fixed time after date, but which had never been presented for acceptance but only for payment. Such suit is governed by the general Article 80, and the period is to be computed from the time when the bill becomes payable—*Ram Chand v. Shadi Ram*, 19 P.R 1888. A bond provided that the money was to be repaid in five years, that interest was to be paid every six months, that in case of non-payment of interest for four six-monthly periods, the creditors would have power to realise the whole of the amount due to him in a lump sum within the fixed period, and that if after the time fixed the amount remained unpaid with the consent of the creditor or for some other reason, then the same condition and rate of interest would be applied and maintained after the time fixed and up to the satisfaction of the amount in full In a suit to enforce the bond it was held that time ran from the expiry of the period (5 years) fixed for payment, and not from the non-payment of two years' interest—*Sham Lal v. Tehariya*, 18 A.L.J. 476, 58 I.C. 278

Where a debt incurred on a bond was to be paid within seven years, but it was stipulated that on default to pay interest consecunvely for two years it was to become payable at once, and there was a default in payment of interest for two years consecutively, held that under the term

of the bond, the creditor was entitled to adopt either of the two alternatives, viz. either to recall the whole of the money due thereunder on the happening of default in payment of interest for two consecutive years, or to enforce the bond at the end of seven years; and if the creditor chose not to avail himself of the first remedy but only of the second, the bond became payable within the meaning of this Article, on the expiry of the period of seven years. The debtor has no right to compel the creditor to stick to the shorter term—*Hari Lal v. Thamman*, 26 O.C. 121, 70 I.C. 85, A.I.R. 1923 Oudh, 19, following *Durga v. Tota Ram*, 16 O.C. 45, 19 I.C. 738. It should be noted that the learned Judge who gave the decision in 26 O.C. 121, gave it reluctantly, following 16 O.C. 45. He was really of opinion that the word 'payable' in Article 80 meant payable at the earliest time, and that the bond in suit became payable on default of payment of two years' interest. And this view has now been taken in a later case of the same Court. In this case a bond provided for repayment of the amount in six months but the interest was to be paid month by month, and in the event of failure to pay interest in one month the creditor was to have the right to file a suit at once for the whole amount, without waiting for the stipulated period of six months. Interest was never paid. Held that the bond became 'payable' on the occurrence of the default in the payment of first month's interest, and that a suit not brought within 3 years from the date of the first default was barred by limitation; the fact that the money was stated in the deed to be payable five months later did not entitle the creditor to ignore the earlier date as the starting point of limitation and select the later one because it suited his convenience better. He was not entitled to waive the right accruing on the first default, because the right of the creditor to waive such right is recognised only by Article 75 and not by any other Article—*Pherai v. Pudas*, 27 O.C. 318, 1 O.W.N. 647, A.I.R. 1925 Oudh 502 (dissenting from 26 O.C. 121 and 16 O.C. 45).

In case of a registered bond falling under this Article, the period of limitation would be six years from the date when the bond becomes payable. See *Shib Dayal v. Meherban*, 45 All. 27 (42) (F.B.)

If a promissory note is accompanied with a writing postponing the right to sue or postponing the date of payment, the suit is governed by Article 80, and not by Article 73. See 42 All. 55 and 39 Mad. 129 (F.B.) cited under Article 73. In a suit upon a promissory note executed by the defendant in favour of the plaintiff Bank, it appeared that it was customary for the Bank to fix a period for payment and that the defendant's application for the loan was in a printed form in which he added the words "for six months' *thavanai*" and on which the officer of the Bank concerned made an endorsement to the effect that the amount might be lent to the defendant "for six months' *thavani*." Held, that the application form with the endorsement therein formed part of the same transaction as the suit-note, and was receivable in evidence for fixing the date of payment of the amount of the note, and that the suit on the note was governed by Article 69 or 80, the starting point of limitation being six months.

after the date of the note—*Ponnusami v. Vellore Commercial Bank*, 38 M.L.J. 70, 56 I.C. 384.

81.—By a surety against Three When the surety pays the principal deb- years. the creditor. tor.

398A. A suit by the surety against the principal debtor for recovery of moneys paid by the former on behalf of the latter is governed by Article 81 and not by Art. 61—*Kunj Lal v. Gulab Ram*, 55 P.L.R. 1922, 67 I.C. 365, A.I.R. 1921 Lah. 335. A suit by a creditor against the surety being decreed in the small Cause Court, the surety applied for review, and deposited the amount of the decree under sec. 17 of the Prov. S. C. C. Act. He made the deposit on the 5th September 1919. The application for review was dismissed and on the 21st of April 1920 the creditor withdrew the money. The surety then brought the present suit against the principal debtor on the 20th April 1923. *Held* that the suit was within time. Under this Article the date on which the creditor was paid was the date on which the creditor actually withdrew the money; and not the date when the money had been deposited along with the application for review because the creditor was not entitled to withdraw the money immediately it was deposited and before the application for review was dismissed—*Mahammad Naqi v. Harqu Lal*, 82 I.C. 1011, A.I.R. 1925 All. 164. A surety's right of action against the principal debtor is not barred on the ground that the creditor's action against the principal debtor is barred—*Considine v. Considine*, (1846) 9 Ir. L.R. 400.

82.—By a surety against Three When the surety pays a co-surety. years. anything in excess of his own share.

399. The right of surety against a co-surety for contribution can be asserted, notwithstanding that the creditor's right of action against him is barred—*Wolmershausen v. Gullick*, [1893] 2 Ch. 514. No action can lie by a surety against a co-surety until the latter has paid more than his share of the debt—*Davies v. Humphreys*, (1840) 6 M. & W. 153 (169) (per Parke B).

83.—Upon any other Three When the plaintiff is actually contract to in- years. tually damaged. demnify.

400. Articles 81 and 83 :—From a comparison of Articles 81 and 83 it would seem that Article 81 is confined to cases of loans of money, or where one person is liable for a definite sum which at the time constitutes, or which will at some future time constitute, a debt, and to suits by the surety against the principal debtor, where he (the surety) has himself paid the creditor—*Madar v. Ahmed*, 98 P.R. 1881. But where the security was given for the due performance of a contract (so that the promisee could only claim damages as distinguished from a debt) and

the surety had been compelled to pay such damages, a suit by the surety against the principal debtor to be indemnified for the amount paid would fall under Article 83.

401. Contract to indemnify :—The word "contract" in this Article does not mean an express contract, it would include both express and implied contracts—*Ram Barat v. Sheodani*, 16 C.W.N. 1040, 16 I.C. 73.

It has been held by the Madras High Court that the legal obligation of a principal to indemnify an agent under section 222 of the Contract Act is not a "contract to indemnify" within the meaning of this Article—*Kandasami v. Avayammal*, 34 Mad 167 (171). But the Lahore High Court (then Chief Court) holds that the right of an agent to be re-imbursed by his principal in respect of losses sustained by the agent in his agency is a direct consequence of the contractual relationship of principal and agent, and a suit to enforce that right is governed by this Article—*Manghi Ram v. Ramsaran Das*, 23 P.R. 1915, 100 P.L.R. 1915, 26 I.C. 415; followed in *Ganesh Das v. Narsingh*, 30 P.L.R. 35, 115 I.C. 767. A suit for the recovery of the money due on account of the value of goods supplied by the plaintiff as commission agent to the defendants is governed by Article 83—*Sarab Dial v. Devi Ditta*, 59 P.L.R. 1918, 46 I.C. 541 (542). Plaintiffs were commission agents. At the request of the defendants they purchased some goods for them and paid the price out of their own pocket. Subsequently they sold the goods at a loss and instituted the present suit for the recovery of the loss. Held that the suit was governed by this Article, and time ran when the plaintiff purchased the goods and made payment on behalf of the principals, and not from the date when they sold the goods at a loss—*Kirpa Ram v. Sawan Mal*, 29 P.L.R. 60, A.I.R. 1927 Lah 826 (827), 106 I.C. 40, *Bhagat v. Harjas*, 112 I.C. 719, A.I.R. 1928 Lah 424 (425) *Kadari Pershad v. Har Bhagwan*, 3 Lah L.J. 65, 66 I.C. 900, A.I.R. 1921 Lah 167. A suit to recover the losses alleged by the plaintiffs to have been sustained by them in certain dealings in some articles of trade which they undertook as commission agents on behalf of the defendants is not a suit for money payable on accounts stated between the parties under Art. 64, but a suit governed by Article 83—*Munshi Ram v. Bhagwan*, 27 P.L.R. 32, 92 I.C. 595, A.I.R. 1926 Lah. 152.

A man who is entrusted with a certain sum of money with instructions to pay it to another person to whom the person paying the money is liable, keeps the money at his peril. If he fails to pay it or delays payment beyond a reasonable time, he is liable for damages as for a breach of contract to the extent of the loss which the person depositing the money has suffered by reason of such failure or delay, and a suit to enforce the security or for damages resulting from the delay falls under Article 83, and must be filed within 3 years of the date of actual injury—*Kedar Nath v. Har Govind*, 24 A.L.J. 550, 95 I.C. 913, A.I.R. 1926 All 605. Where a party by his contract undertakes to pay money to a third person, and he not having paid, the person to whom the money should be paid sues the original debtor and recovers the money

a suit brought by the lastnamed person (plaintiff) for loss or damage falls under this Article, and time runs not from the date of the breach of contract, but from the time when the creditor recovered money from the plaintiff—*Ram Ratan v. Abdul Wahid*, 49 All. 603, 101 I.C. 691, A.I.R. 1927 All. 435.

The question whether a provision in a sale-deed that the vendee should pay off a debt due from the vendor is or not a contract to indemnify is purely a question of construction depending on the wording of the document in each case. Where the property so transferred was worth more than the amount of the debt which the vendee undertook to discharge, and the discharge of the debt was the only consideration for the transfer, the contract to pay the debt implied a contract to indemnify. But where the gist of the transaction is simply that the vendor leaves part of the consideration in the vendee's hands with a direction that he shall pay the vendor's debts, it would be open to the vendor to sue the vendee as soon as the vendee fails to pay the debts after they have become due, and the words of such a covenant would not amount to a contract to indemnify—*Kalyammal v. Kolandavela*, 5 L.W. 228, 38 I.C. 188.

The plaintiff executed a bond in favour of U and borrowed money of which the defendant had the whole benefit. A suit brought by U against the plaintiff for the money was compromised, and the plaintiff had to pay the money in terms of the compromise. A suit by the plaintiff against the defendant for the recovery of money paid by the plaintiff under the compromise was a suit on a contract to indemnify under this Article—*Girraj v. Mulchand*, 29 All. 627.

Where the covenant to indemnify is contained in a registered instrument, the suit will be governed by Article 116 read with Article 83. Thus, A and B exchanged lands under a registered deed which contained a clause to the effect that there was no dispute in respect of the said lands, and that if disputes should arise, the respective party should be answerable to the extent of his private property. A was deprived of some of the lands he got by the exchange, and he sued B on the aforesaid covenant, for the value of the lands of which he was dispossessed. It was held that the suit fell within Article 116 read with Art. 83 of the Limitation Act (and not under Article 113), and was in time if brought within six years from the date of the deprivation, although more than six years after the date of the exchange—*Srinivasa v. Rangasami*, 31 Mad. 452. Similarly, one S sold certain immoveable property under a registered sale-deed. The consideration money was Rs. 3,900, out of which Rs. 2,000 was to be paid by the vendees to a mortgagee, and in the event of the mortgage money being in excess of Rs. 2,000, S was to be liable for such excess. The vendees were forced to sue the mortgagee for redemption, and obtained a decree on 21st July 1911 on payment of Rs. 3,100. This payment was made on 5th December 1911, and on 20th July 1916 the vendees brought the present suit against S for recovery of Rs. 1,100 as well as the costs of the redemption suit. Held that suit fell under Article 116 read with Article 83, and time ran

from the date when the plaintiffs were actually damnified i.e., on 5th December 1911, when the payment was actually made by the plaintiff, and that the suit was within time—*Abdul Aziz v. Md. Bakhsh*, 2 Lah. 316, A.I.R. 1921 Lah. 260, 64 I.C. 431. In 5 L.W. 228, 38 I.C. 188 (supra) it was held that if Art. 83 applies, Art. 116 is inapplicable. This is erroneous; vide 44 Cal. 759 (P.C.).

Where in addition to the contract to indemnify a charge is created, the suit will be governed by Article 132, and not by this Article—*Rangasami v. Kuppusami*, 1921 M.W.N. 472, 66 I.C. 554, A.I.R. 1921 Mad. 514.

402. Commencement of limitation :—Under a contract of indemnity, the cause of action arises when the damage which the indemnity is to cover is suffered—*Reynolds v. Doyle*, (1840) 1 M. & G. 753. Thus under an express contract to indemnify a party to litigation against costs, the cause of action arises upon the actual payment of costs by such party, and not when the costs were incurred or the solicitor's bill was delivered—*Collinge v. Heywood*, (1839) 9 A. & E. 633. Similarly, under an implied promise to indemnify, time runs from actual loss—*Huntley v. Sanderson*, (1833) 1 Cr. & M. 467. The assignee of a lease is under an implied obligation, in the absence of an express covenant, to indemnify the assignor for breach of covenants, and in a suit by the assignor against the assignee to recover the damages paid by him (assignor) to the original lessor, limitation runs only from the time when the plaintiff was actually damnified, i.e., when damages were actually recovered from him by the original lessor—*Pepin v. Chunder Seekur*, 5 Cal. 811. Where a portion of the mortgaged property was sold subject to the mortgage, but the buyer having failed to pay off the mortgage, the mortgagee sued on his mortgage and the whole of the mortgaged property was sold in execution of the mortgage-decree, and the seller was dispossessed of the lands which had been retained by him, a suit by the seller for damages against the buyer was governed by this Article, and time ran from the date when the seller was actually damnified, viz., the date of dispossession—*Ram Barat v. Sheodeni*, 16 C.W.N. 1040, 16 I.C. 73.

Claim to indemnity by way of set-off—When a suit is brought for the recovery of the price of goods supplied (the contract for supply of goods being evidenced by a deed containing a clause for indemnifying the defendants in case of default in supplying goods at the time fixed), and the defendants claim damages for irregular supply of goods, by way of set-off, limitation in respect of the set-off will run up to the date of the suit by the plaintiff, and not up to the date on which the set-off is claimed by the defendants—*Pragi v. Maxwell*, 7 All. 284.

84.—By an attorney or vakil for his costs of a suit or a particular business,	Three years.	The date of the termination of the suit or business, or (where the attorney or vakil
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there being no express agreement as to the time when such costs are to be paid.

properly discontinues the suit or business) the date of such discontinuance.

403. Scope :—This Article applies only to suits; it does not apply to an application by an attorney for enforcement of payment of costs by a summary order of the High Court, under the High Court Rules. Such an application is not governed by any other Article, so that it is exempt from the law of limitation; even Article 181 does not apply, because it is not an application under the Civil Procedure Code—*Abba Haji Ishmail v. Abba Thara*, 1 Bom. 253; *Wadia v. Purshotam*, 32 Bom. 1; *Narendra Lal v. Tarubala*, 48 Cal. 817, 25 C.W.N. 800. But although such applications are not governed by any special rule of limitation, still a discretion should be exercised by the Court in allowing such applications, when a question of lapse of time is raised. Since the High Court Rule provides an alternative relief by suit, it is just and proper that the time limit of such applications should be the time allowed for such suit, viz., the time allowed by this Article—*Lakhmani v. Dwijendra*, 46 Cal. 249 (253), 23 C.W.N. 473.

An application under section 24 of Act XV of 1859 is a "business" within the meaning of this Article—*Watkins v. Fox*, 22 Cal. 943 (949).

404. Termination of suit :—A solicitor who is retained to prosecute or defend an action enters into an entire contract to carry on the proceedings until the action is finally terminated, and he cannot sue for his costs until that time has arrived—*Harris v. Osborne*, (1834) 2 C. & M. 629; *Whitehead v. Lord*, (1852) 7 Ex. 691. The termination of a suit is the date when judgment is given by the Court in which the suit was commenced—*Balkrishna v. Govind*, 7 Bom. 518; *Watkins v. Fox*, 22 Cal. 943; *Rothery v. Munnings*, (1830) 1 B. & Ad. 15. But when an appeal is brought, and the same Vakil or Attorney continues to conduct the suit in appeal, that will be a continuation of the original suit, and time will not run until the disposal of the appeal—*Harris v. Quine*, (1869) L.R. 4 Q.B. 653 (658). See also 36 Cal. 609 (614) (where the attorney acted in the suit as well as in the appeal). An action for costs may be brought within 3 years of the termination of the suit, and the fact that certain items in the bill of costs are more than three years old, is immaterial. See *Martindale v. Falkner*, (1846) 2 C.B. 706.

Execution proceedings are not part of a suit. A suit can ordinarily be said to terminate when there is nothing more to be done in it except execution. The fact that the attorney may have to appear in execution proceedings cannot postpone his right of action for costs which arises as soon as the judgment is passed—*Administrator-General v. Chunder Cant.* 22 Cal. 952 (Note).

Proceedings taken in connection with the taxation of the costs are not part of the suit in which the attorney was engaged; the suit terminates as soon as the judgment is delivered, and the period of limitation for an action by the attorney for the recovery of his costs begins from the date of judgment—*Watkins v. Fox*, 22 Cal. 943; *Rothery v. Munnings*, (1830) 1 B. & Ad. 15; the taxation of the costs is not a condition precedent to the institution of the suit for costs by the attorney—*Makham Lal v. Nalin*, 35 Cal. 171 (175). But the Madras High Court is of opinion that after judgment is given it is the duty of the solicitor to see that the decree is properly drawn up, and the suit does not end until the costs are regularly taxed and inserted in the decree and the decree is issued—*Narayana v. Champion*, 7 Mad. 1. And it has been held in a later Calcutta case that the period of limitation for the attorney's action for the recovery of his costs runs from the date of the last work done by the attorney in relation to the suit in which he was engaged, and the work includes the taxation of costs in the suit and appeal in which the attorney has acted. The attorney's cause of action does not arise until the costs are taxed, for until taxation the amount payable by the client cannot be ascertained—*Atul Chunder v. Lakshman*, 36 Cal. 609.

A compromise between the parties not made through or certified to the Court is not a termination within the meaning of this Article. A solicitor was retained in July 1871, to execute a decree. In November 1871, a prohibitory order was made in the case, after which the solicitor did nothing more in the matter. In June 1872, the decree-holder and judgment-debtor settled the matters in dispute between them without the knowledge of the solicitor; but this compromise was not made through or certified to the Court which passed the decree. In a suit brought in December 1875, by the solicitor against the decree-holder to recover the amount of his bill of costs, it was held that the compromise did not terminate the business for which the solicitor was retained and that the plaintiff's claim was not barred by this Article—*Hearn v. Bapu*, 1 Bom. 505.

In respect of "business" i.e., non-litigious matters, time runs from the termination of the business. If there are natural breaks in the business, separate bills may be sent in for each separate item of the business, and the period of limitation will run separately in respect of each item; hence later items cannot be relied on to save earlier ones—*Phillips v. Broadley*, (1846) 9 Q.B. 744.

405. Costs —The word "costs" in this Article does not mean only the out-of-pocket expenses of the legal practitioner but includes also the remuneration payable to him—*Rajah of Vizianagram v. Narasinga Row*, 29 I.C. 763 (Mad.).

85.—For the balance Three The close of the year in
due on a mutual, years. which the last item
open and current admitted or proved is
account, where entered in the ac-

there have been reciprocal demands between the parties.

count, such year to be computed as in the account.

406. Mutual, open and current account :—An *open account* is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions. An *account current* is an open or running account between two or more parties or an account which contains items between the parties from which the balance due to one of them is or can be ascertained. *Mutual accounts* are such as consist in reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits. An account under which *one party has merely received and paid monies on account of the other* is not a mutual account properly so called. Each party must receive and pay on account of the other. In such an account, each party should be able to say to the other "I have an account against you."—*Ram Pershad v. Harbans*, 6 C.L.J. 158; *Fyzabad Bank Ltd. v. Ram Dayal*, 4 P.L.T. 571, A.I.R. 1924 Pat. 107; *Dau Dayal v. Pearey*, 50 All. 645, A.I.R. 1928 All 236 (238); *Tea Financing Syndicate v. Chandra Kumar*, 56 Cal. 575; *Ebrahim Ahmed v. Abdul Haq*, 8 L.B.R. 149, 27 I.C. 879; *Gopal Rai v. Firm Harchand Ram*, 3 P.L.T. 492, A.I.R. 1922 Pat 364; *Joharmal v. Hiralal*, 7 Pat 238, A.I.R. 1928 Pat 221 (222). An account in which only one party lends is not a mutual account; an account which is settled is not an open account; an account which is closed is not a current account—*Premji v. Sassoon*, 29 Bom L.R. 375, 102 I.C. 225, A.I.R. 1927 Bom. 125. Where the plaintiff treated the account with the defendant as finally closed and started a new account and treated it as entirely separate, the mere adding of the old balance later on, in order to avoid limitation, at the end of the new dealings would not make it an open account—*Firm Bhagwan Das v. Firm Nand Singh*, 28 P.L.R. 146, 100 I.C. 815, A.I.R. 1927 Lah. 848 (849). Where there was no formal closing of the account, the account only being totalled each year and the balance due being carried forward, *held* that the account was an open one—*Imrat v. Lal Chand*, 75 P.R. 1910, 124 P.L.R. 1910, 79 I.C. 715. As soon as an account ceases to be open it becomes an account stated (Art. 64).

To constitute a *mutual account* there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations—*Shiva Gowda v. Fernandez*, 34 Mad. 513; *Velu Pillai v. Ghose Mahomed*, 17 Mad. 293; *Kunhikutti v. Kunhammad*, 44 M.L.J. 184, A.I.R. 1923 Mad. 278; *Ratan Chand v. Asa Singh*, 4 Lah L.J. 217, A.I.R. 1922 Lah. 188; *Ganesh v. Gyanu*, 22 Bom 606; *Satappa v. Annappa*, 47 Bom 128 (136); *Appa v. Ramakrishna*, 53 Bom. 652, A.I.R. 1930 Bom. 5 (11); *Chittar Mal v. Behari Mal*, 32 All. 11; *Gopal Rai v. Firm Harchand*

Ram, 3 P.L.T. 492, A.I.R. 1922 Pat. 364. For an account properly to be called a mutual account, there must be mutual dealings in the sense that both parties come under mutual liability to each other—*Padwick v. Hurst*, 18 Beav. 575.

The test of mutuality is, that the dealings between the parties should be such that the balance is sometimes in favour of one party and sometimes in favour of the other. An account which consists of entries of payments made by one party in deduction of a debt to another and of payments made by the latter on behalf of the former, is not a mutual account—*Gopal Rai v. Firm Harchand Ram*, 3 P.L.T. 492, 66 I.C. 30, A.I.R. 1922 Pat. 364. A mutual account is not merely one where one of two parties has received money and paid it on account of the other, but where each of two parties has paid on the other's account—*Phillips v. Phillips*, (1852) 9 Hare 471.

Thus, where the plaintiff alone has been the banker making advances and receiving part-payments from time to time, and the balance has always been in plaintiff's favour, the account cannot be said to be a mutual account—*Budh Ram v. Ralli Ram*, 103 P.W.R. 1916, 37 I.C. 300; *Kunhikutti v. Kunhammad*, 44 M.L.J. 184, A.I.R. 1923 Mad. 278. Where the account of the plaintiff Bank showed that the defendant borrowed a sum of money, and on various dates during the period of the account certain sums were paid by the defendant which were all credited to the account and set off against the pre-existing debt, and the account never showed any balance in favour of the defendant, *held* that the account indicated nothing more than the record of a loan transaction, and the payments made by the defendant were made in part discharge of the obligation under which he lay with respect to the Bank: the account was not a mutual account within the meaning of this Article—*Bank of Multan Ltd v. Kamta Prasad*, 39 All. 33, 14 A.L.J. 949, 35 I.C. 199. Where the defendant made part-payment from time to time of the price of goods supplied to him by the plaintiff and the amount of payments did not at any time exceed the amount due to the plaintiff, *held* that there were no reciprocal demands between the parties, and it was not a mutual account. The case falls under Art. 52—*Lalji v. Ghasi Ram*, 7 O.W.N. 420, A.I.R. 1930 Oudh 287 (288). Where periodical consignment of goods was made by the defendants to the plaintiffs simply and solely on account of antecedent loans advanced by the plaintiffs and with a view to reduce the balance due thereunder, *held* that there was no mutuality and reciprocity between the parties, and the suit for recovery of the sums due did not fall under this Article—*Shiva Gouda v. Fernandez*, 34 Mad. 513.

But where the plaintiff advanced money to the defendant and the latter consigned goods to the former for sale on commission, it was *held* that there were independent obligations on both sides, because there existed on the one side between the plaintiff and the defendant the relation of creditor and debtor, and on the other side between the defendant and the plaintiff, that of principal and agent; and the account

between the parties was a mutual open and current account—*Namberumal v. Kottayya*, 14 M.L.T. 498, 21 I.C. 773; *Bengal National Bank v. Jatindra*, 56 Cal. 556, 33 C.W.N. 412 (417); *Ratan Chand v. Asa Singh*, 4 Lah.L.J. 217, A.I.R. 1922 Lah. 188; *Firm Behari Lal v. Har Narain*, 92 I.C. 674, A.I.R. 1926 Lah. 283. The plaintiff who owned a ginning factory, lent money to the defendants for buying cotton. The cotton, when purchased, was ginned and pressed by the plaintiff, who sold it on behalf of the defendants. The ginning and pressing charges as well as the principal and interest were debited to the defendants and the sale proceeds of the cotton bales were credited into the defendants' account as against the advances made by the plaintiff, the commission earned and other items. *Held* that there was a mutuality of dealings—*Madhab Motiram v. Jairam*, 23 Bom. L.R. 540, A.I.R. 1921 Bom. 451, 63 I.C. 950. Where a man lends money in one capacity and in another capacity acts as an agent for the borrower, and the two accounts are put together, there is a mutuality of dealings between the parties, although the money may have been lent for the express purpose of enabling the borrower to provide business as commission agent to the lender. In such a case, Art. 85 applies—*Dau Dayal v. Pearey*, 50 All. 645, A.I.R. 1928 All. 236 (239), 108 I.C. 694. Where A supplies B with one kind of goods or work and obtains from him another kind, debiting him with the cost of the former and crediting him with the value of the latter, *held* that it was a case of mutual account—*Srinath v. Park Pittar*, 5 B.L.R. 550; *Sitayya v. Rungareddi*, 10 Mad. 259. Where, by virtue of an agreement, advances were made from time to time by the plaintiffs to the defendant in lieu of his agreeing to consign tea crop to the plaintiffs for sale, the proceeds of such sale to be appropriated towards the advances, and it appeared from the account that certain sums were debited against the defendant as having been paid by the plaintiff, and certain consignments of tea were sent and the plaintiff credited the defendant with the sale-proceeds of tea but also debited him with a certain amount of commission, *held* that there was mutual open and current account between the parties. Under the agreement the making of advances and the consignment of tea were to be brought together into one account as items which would produce a balance. The tea sent by the defendant was not sent merely by way of discharging the defendant's debt but was sent in the course of dealings designed to create a credit to the defendant which when brought into the account would operate by way of set-off to reduce his liability, the obligation to account for the proceeds of the tea received being an independent obligation on the plaintiff, in spite of the fact that he was expected and intended to apply such proceeds in liquidation of his advances—*Tea Financing Syndicate v. Chandra Kamal*, 34 C.W.N. 1175 (1189) (reversing *Tea Financing Syndicate v. Chandra Kamal*, 56 Cal. 575). Where there are entries on one side showing cash advances, price of cloth sold, payments made to third persons on behalf of the defendants for things supplied and commission charged, for purchases made by the plaintiff for the defendants, and on the other side there are entries showing that the

plaintiff firm received various kinds of grain from the defendants and having sold them in the market credited the proceeds to the defendant, the suit comes under this Article—*Abdul Haq v. Firm Shivaji Ram*, A.I.R. 1922 Lah. 338, 71 I.C. 259. Where the plaintiff sometimes borrowed money from the defendant, and the defendant sometimes borrowed from the plaintiff, *held* that there was a mutual account—*Ganesh v. Gyanu*, 22 Bom. 606. Where accounts have been kept from year to year extending over a period of 20 years in which the balance has been drawn every year but no formal adjustment has been made at any time between the parties, and there is nothing to shew that the payment made by the defendants to the plaintiff were mere part-payments of the advances already made, *held* that this was really a business account on either side and that there was a mutual open and current account—*Satappa v. Annappa*, 47 Bom. 128 (135), 24 Bom. L.R. 1284, A.I.R. 1923 Bom. 82.

It is not necessary to constitute a mutual account that the accounts should be kept by both the parties. Where it was shewn that the accounts were going on between the parties, and balances were struck and entries were made sometimes to defendant's debit, and sometimes to his credit, the mere fact that the accounts were kept by one party only was no sufficient cause for holding that the account was not a mutual, open and current account—*Jas Ram v. Attarchand*, 16 P.R. 1916, 178 P.L.R. 1915, 30 I.C. 491. A employed B as his agent to manage certain boats for which he was to receive a commission. B alone kept accounts in which he credited the sums received from the hire of boats and debited the amounts which had been paid for their upkeep and the commission due to him. *Held* that this account showed reciprocal demands and that it fell under this Article—*Lakshmayya v. Jagannatham*, 10 Mad. 199.

In Madras, it has been held that it is not even necessary that an account in order to be a mutual account, should have been kept in writing. It is sufficient if the dealings amounted to mutual debit and credit on both sides; and if the account is kept in writing, it is enough if one of the parties kept it so—*Lakshmayya v. Jagannatham*, 10 Mad 199.

The fact that the balance is a shifting one, sometimes in favour of the plaintiff and sometimes in favour of the defendant, though valuable as an index of the nature of the dealings, is not a decisive test as to the mutuality of the account—*Ganesh v. Gyanu*, 22 Bom. 606; *Ram Pershad v. Harbans*, 6 C.L.J. 158, *Thupatti v. Ranga Charlu*, 23 M.L.J. 516, 17 I.C. 48. A shifting balance is a test of mutuality but its absence is not conclusive proof against mutuality—*Ram Pershad v. Harbans*, 6 C.L.J. 158, *Dau Dayal v. Pearey*, 50 All 645, A.I.R. 1928 All 236 (238); *Joharmal v. Hiralal*, 7 Pat. 238, A.I.R. 1928 Pat. 221 (222); *Velu v. Ghosh*, 17 Mad 293; *Ganesh v. Gyanu*, 22 Bom. 606. If there is a balance in favour of either party, it follows that there must be mutual liabilities of both parties to each other. If the balance is always in favour of one party in the very nature of the transactions, then the

case is one in which there are not separate mutual dealings. In order to prove a mutual, open and current account, it is sufficient to prove mutual dealings between the parties consisting of sales made or services performed by each party to or for the other, creating mutual duties or reciprocal demands—*Kunhi Kuttial v. Kunhammad*, 44 M.L.J. 184, A.I.R. 1923 Mad. 278; *Ram Pershad v. Harbans*, (supra). The mere fact that the defendants have been debtors throughout does not show that the accounts were not mutual. Whether an account is mutual or not depends upon the nature of the dealings between the parties. It is sufficient, for an account to be mutual, if the dealings are such that the balance might have been in favour of either party: it is not essential that the balance should in fact have been in favour of the defendants at some stage—*Satappa v. Annappa*, 47 Bom. 128 (135), 24 Bom. L.R. 1284, A.I.R. 1923 Bom. 82. It is not necessary that the balance should actually shift from one side to the other; all that is necessary is that from the nature of the transactions it is capable of so shifting—*Premji Virji v. Sir E. E. Sasoon*, 29 Bom. L.R. 375, 102 I.C. 225, A.I.R. 1927 Bom. 125.

It has been held that this Article is intended to apply to cases where an account has been going on between two parties, and *balances have been struck* from time to time, showing the amount due from one of such parties to the other; and the suit to which this Article is intended to apply is a suit brought by one of those parties against the other for the balance found to be due on that account—*Laljee v. Roghunundun*, 6 Cal. 447. But this Article does not require that the balances should have been actually struck; it simply requires that the account should be such that if the balances were actually struck at various times, the balances at those times should have been sometimes in favour of the plaintiff, and sometimes in favour of the defendant.

It is not correct to say that an account is closed whenever a balance is struck, until it is re-opened by fresh dealings. Where it appears that there were mutual dealings and that though balances were struck from time to time these were mere acknowledgments and not agreements to pay, *held* that the case was not one of a closed account (Art. 64) but of a mutual open and current account. The mere fact that there were no further transactions between the parties since the striking of the last balance, did not change the nature of the account; for it cannot be held that an account becomes closed whenever a balance is struck—*Jwala Das v. Hukum Chand*, 66 I.C. 387, A.I.R. 1922 Lah. 316.

407. Reciprocal Demands :—An account is mutual when each has a *demand* or right of action against the other; and therefore unless both the parties could, during the currency of the account, each have said to the other 'I have an account against you,' there can be no mutual account. And therefore, if the balance was sometimes in favour of the defendant but generally in favour of the plaintiff, the banker, the account would not be a mutual one—*Hajee Syud v. Ashrufoonnissa*, 5 Cal. 759 (763); *Joharmal v. Hiralal*, 7 Pat. 238, A.I.R. 1928 Pat. 221.

(222); *Ram Sundar v. Amrit*, 4 P.L.T. 424, A.I.R. 1923 Pat. 242. Where there is no evidence that the defendant ever made or was in a position to make any sort of demand whatever upon the plaintiff, held that there was no reciprocal demand between the parties—*Tea Financing Syndicate v. Chandra Kamal*, 56 Cal. 575, A.I.R. 1929 Cal. 641 (643). But it is not necessary that the parties in the course of their dealings should have made actual demands upon one other. This Article applies where the nature of the business between the parties is such as to give rise to reciprocal demands, i.e., where the dealings are such that sometimes the balance may be in favour of one party and sometimes in favour of the other—*Narandas v. Vissandas*, 6 Bom. 134; *Khushalo v. Behari*, 3 All 523; *Satappa v. Annappa*, 47 Bom 128 (136); *Fyzabad Bank v. Ramdayal*, 4 P.L.T. 571, 74 I.C. 831, A.I.R. 1924 Pat. 107. Where the transactions sometimes resulted in profit and sometimes resulted in loss; at one time the account stood in favour of the defendant, at another time in favour of the plaintiff; held that there was reciprocity of demands between the parties and the account was not made up of items on one side only. The defendant was at one time in a position to say to the plaintiff that he had an account against him—*Joharmal v. Hira Lal*, 7 Pat. 238, A.I.R. 1928 Pat. 221 (223), 107 I.C. 533. And this is so, even though during the last few years the balance has been always in favour of the plaintiff—*Imrat v. Lal Chand*, 75 P.R. 1910, 124 P.L.R. 1910, 7 I.C. 719. Where the accounts are such that the defendants could not have made any such demand during the currency of the account, the requirements of this Article have not been fulfilled—*Hardilal v. Pukhar Das*, 3 Lah. L.J. 362, 67 I.C. 933, A.I.R. 1921 Lah. 256.

408. Limitation—The period of limitation runs from the close of the year in which the last item was admitted or proved. If a mutual, open and current account be adjusted in the middle of a current year, and in that year there is entered one item admitted or proved, limitation will run from the end of the year and not from the date of the adjustment—*Ganesh Lal v. Sheogolam*, 5 C.L.R. 211. Where the last item in a mutual, open and current account was advanced to the defendants within limitation but this item was advanced more than three years after the close of the year in which the last preceding item was entered, the suit is barred by limitation in respect of the previous account—*Gobind Ram v. Jawala Ram*, 1 Lah 12, 55 I.C. 872.

An open mutual account will not be statute barred, if there is any item in it within the period of limitation, even though the earlier items may be beyond the period; because as long as the account is continued the statute of limitation does not apply—*Foster v. Hodgson*, (1812) 19 Ves 183; *Tea Financing Syndicate v. Chandra Kamal*, 34 C.W.N. 1175 (1188). The statute is retarded by every fresh item falling within the period of limitation, and it makes no difference on which side the account is—*Ord v. Ruspin*, (1797) 2 Esp. 569. See also *Callling v. Skoulding*, (1795) 6 T.R. 189.

- 86.—On a policy of insurance, when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers. Three years. When proof of the death or loss is given or received to or by the insurers, whether by or from the plaintiff, or any other person.

408A. Time runs under this Article not from the date of receipt of notice of death or loss, but from the date when the insurers *receive proof* of the death or loss. An agreement providing that a suit upon the policy must be brought within a time (e.g. three months or one year) which is shorter than that provided by Art. 86, is not void under sec 28 of the Contract Act, and a suit brought after the stipulated period would not be maintainable—*Baroda Spinning Co. v. Satyanarayan Insurance Co.*, 38 Bom. 344, 21 I.C. 694 (696); *Hira Bhai v. Manufacturers' Life Insurance Co.*, 14 Bom. L.R. 741, 16 I.C. 1001. See also *South British F. and M. Insurance Co. v. Brojo Nath*, 36 Cal. 516, 13 C.W.N. 425, 2 I.C. 573.

If the sum assured is not payable *immediately* after proof of the death or loss, the case would fall under Art. 115.

- 87.—By the assured to recover premia paid under a policy voidable at the election of the insurers. Three years. When the insurers elect to avoid the policy.

- 88.—Against a factor for an account. Three years. When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates.

409. A factor is an agent who is entrusted with possession of goods for sale on account of his principal.

Demand, Refusal, Termination of Agency:—See Notes 415 and 416 under the next Article.

The agency of a person entrusted to sell goods on behalf of the plaintiff does not terminate when the goods are sold and the money is received by the agent; therefore limitation does not begin to run when any portion of the goods is sold but only from the date of demand made by the principal during the time the price remains unpaid by the agent—*Babu Ram v. Ram Dayal*, 12 All. 541; *Fink v. Buldeo*, 26 Cal. 715.

89.—By a principal Three When the account is, against his agent years. during the continu- for moveable prop- erty received by erty received by demanded and re- the latter and not fused, or where no accounted for. such demand is made, when the agency terminates.

It should be noted that Articles 88, 89 and 90 apply to suits by principals against agents, suits by agents against principals are not provided for in these Articles.

410. Suit for account and money.—This Article applies to a suit by a principal against his agent for an account and for any money that may be found due on such account being taken; the phrase "moveable property" includes money—*Shib Chandra v. Chandra Narain*, 32 Cal. 719; *Hafezuddin v. Jadunath*, 35 Cal. 298; *Pran Ram v. Jagadish*, 49 Cal. 250 (252), A.I.R. 1922 Cal. 355; *Venkatachalam v. Narayanan*, 39 Mad. 376; *Jogendra v. Debnath*, 8 C.W.N. 113; *Madhab v. Debendra*, 1 C.L.J. 147; *Asghur Ali v. Khurshed*, 24 All. 27 (P.C.) A suit for recovery of money found due on an account and a suit for account are really one and the same thing—*Jhapajhannessa v. Bamasundari*, 16 C.W.N. 1042, 16 I.C. 414.

A suit by a principal against his agent for an account as a preliminary step to enable the principal to recover from the agent the moneys received by him and not accounted for, is governed by this Article, but so far as it seeks to obtain certain account papers from the agent, the suit is governed by Article 120 and the cause of action arises from the date when such papers are to be submitted to the principal according to the contract between them—*Madhab v. Debendra*, 1 C.L.J. 147 Where a suit is instituted against an agent for the recovery of a definite sum, and there is a prayer that the amount stated in the plaint or any larger sum proved by the decision of the Court to be due by the agent may be decreed to be paid, it is virtually a suit for an account—*Hurronath v. Krishna*, 14 Cal. 147 (P.C.).

Even where there is a contract to render account year by year, a suit by the principal against his agent for such account is governed by this Article (which is more specific) and not by Art. 115 which is only a residuary Article relating to contract—*Bhabatarini v. Sheikh Bahadur*, 30 C.L.J. 90, 53 I.C. 675; *Venkatachalam v. Narayana*, 39 Mad. 376

(380); *Pran Ram v. Jagodish*, 49 Cal. 250 (253); *Jogindra v. Chinai Muhammad*, 4 Pat. 289, A.I.R. 1925 Pat. 494, 89 I.C. 275; *Madhusudhan v. Rakhal*, 43 Cal. 248 (dissenting from *Jogesh v. Benode*, 14 C.W.N. 122; *Debendra v. Sheikh Esha*, 14 C.W.N. 121 and *Easin v. Barada*, 11 C.L.J. 43). In the last three cases, as well as in *Moti Lal v. Amin*, 1 C.L.J. 211, the suit was held to be governed by Article 115.

A suit by plaintiffs against their step-mother for recovery of their father's property which she was managing on behalf of the family under an arrangement, is governed by this Article or Article 90, so far as the moveable property is concerned, and by Art. 120 or 144 in respect of immoveable property—*Kally v. Dukhee*, 5 Cal. 692. A suit for accounts against the agent in respect of money alleged to have been improperly advanced by him to counsel for purposes of litigation of the principal is governed by this Article, and the agent is bound to prove that the moneys drawn by him for payment as illegal gratification to the counsel reached their destination—*Fox v. Beni*, 13 C.W.N. 212, 4 I.C. 556. A suit by a principal against an agent to recover a specified sum of money lent by the agent to persons to whom he was not authorized to lend the money falls under this Article and not under Art. 90, as such a suit is really a suit for mere money-account—*Muthiah v. Alagappa*, 41 Mad. 1.

If after partition among the members of a joint Hindu family, one member collects the family debts which were left undivided at the time of partition, it may be implied that he realises the debts as an agent of the other members. Consequently a suit against him by the other members may fall under this Article. Art. 62 cannot apply—*Yerukola v. Yerukola*, 45 Mad. 648, 42 M.L.J. 507, A.I.R. 1922 Mad. 150; *Gabu v. Zipru*, 45 Bom. 313. See Note 372 under Art. 62. This view has been recently upheld by the Privy Council in *Virayya v. Adenna*, 58 M.L.J. 245, 51 C.L.J. 136, A.I.R. 1930 P.C. 18 (21), 121 I.C. 205.

411. Suit to enforce a charge :—Where immoveable properties were hypothecated to the principal by the agent as security for the proper discharge of his duty, a suit by the principal against the agent for recovery of the sums found due upon adjustment of accounts, by sale of the properties hypothecated, is a suit to enforce a charge under Article 132, and does not fall under this Article—*Madhusudhan v. Rakhal*, 43 Cal. 248 (dissenting from *Jogesh v. Benode*, 14 C.W.N. 122 where the suit was held to fall under Art. 116); *Pran Ram v. Jagodish*, 49 Cal. 250 (253); *Hafezuddin v. Jadunath*, 35 Cal. 298; *Troilokhya v. Abinash*, 21 C.L.J. 459, 24 I.C. 18. But where the suit is simply for an account (and not to enforce any charge) it will fall under this Article, in spite of the fact that the agent has hypothecated certain properties to the principal—*Suresh v. Nawab Ali*, 20 C.W.N. 356, 29 I.C. 848. Where the agent executed a *kabuliat* in 1305 by which he hypothecated certain properties as security against defalcation and default, and was dismissed in 1306, but was re-appointed in 1307, and then committed defalcation and default in 1307 and 1308, a suit for account against him would be governed by Article 89; Art. 132 cannot apply as the agent's position

in 1307 after dismissal and re-appointment cannot be governed by the *kabuliat* of 1305—*Behari Lal v. Hara Kumar*, 21 C.L.J. 458, 29 I.C. 748.

412. 'Not accounted for'—A suit contemplated by this Article is a suit in which accounts *have* to be taken, where accounts *have* been rendered, this Article has no application. Where an account has been taken and adjusted, and a sum of money has been found due from the agent to the principal, a suit to recover that sum is governed by Art. 64 or 115—*Kesho Prasad v. Sarwan Mal*, 21 C.W.N. 591, 25 L.J. 335.

413. Registered contract—When the contract under which the agent is employed is contained in a duly registered instrument, the suit is governed by Art. 116—*Mati v. Amin*, 1 C.L.J. 211; *Easin v. Irada*, 11 C.L.J. 43, 5 I.C. 186, *Jogesh v. Binode*, 14 C.W.N. 122, 1 I.C. 59; *Harendra v. Administrator-General*, 12 Cal. 357; *Mathura Chedda*, 39 All. 355. But in *Hafezuddin v. Jadu Nath*, 35 Cal. 299 (1901) and *Pran Ram v. Jagadish*, 49 Cal. 250 (253), A.I.R. 1922 Cal. 15, the Calcutta High Court went so far as to say that even if the contract of agency is registered, the case will fall under Article 89 and not under Art. 116 because the former Article is more specific than the latter.

Where sums received by an agent outside the scope of the registered instrument are sought to be recovered, the three years' limitation will apply—*Harendra v. Administrator-General*, 12 Cal. 357.

414. Suit against agent's representatives—If after the termination of the agency by death of the agent, a suit is brought against the heirs of the deceased agent, it would not be governed by Art. 89 for it cannot be said to be a suit for rendition of accounts (the ability to render accounts being *personal* to the agent, and the representatives of the agent not being liable to render accounts), but it is a suit for money payable to the principal by the representatives of the agent out of the assets in their hands—*Kumeda v. Asutosh*, 17 C.W.N. 16, 1 I.C. 742; *Seth Chand Mal v. Kalian Mal*, 96 P.R. 1886; *Rao Jirraj v. Ram Raghubir*, 31 All. 429, *Fatima v. Intiaz*, 1 P.R. 1912, 3 I.C. 930; *Rameswari v. Narendra*, 5 P.L.T. 355, A.I.R. 1923 Pat. 59. In the Calcutta case (17 C.W.N. 5) the suit was held to be governed by Article 115 or 120; in 96 P.R. 1886, by Article 62 or 120, in 1 P.R. 1912, by Article 120, and not by Article 62 or 89; in 31 All. 429, the suit was held to be governed by Article 120, and not by Arts. 57, 62, or 89. That is, Article 120 has been held to be the more appropriate. In the Patna case, the suit was held to be governed by Art. 62 or 115 and not by Art. 120.

In an earlier Calcutta case it was held that if an agent had never been called on to render account during his life-time and then he died and the agency thereby terminated, the principal acquired a *fructus* right to have an account rendered by the agent's representatives and this right was recognised by Article 89, and limitation ran from the day

of the agent (or from the date when administration was taken to the agent's estate, sec 17). In other words, the legal representatives of the agent were held bound to *render accounts*, and the suit for such accounts was held to fall under Article 89—*Lawless v Calcutta Landing and Shipping Co. Ltd*, 7 Cal. 627 (632).

If the time had commenced to run during the life-time of the agent (i.e., if the agency had terminated in the agent's life-time, by dismissal from service) and then the agent died, a suit against his legal representatives would be governed by Article 89, for it is based on the same cause of action as a suit against the agent himself, and the period of limitation in respect of the suit against the representatives would run from the same date as it would have run in respect of a suit against the agent himself had he lived, viz. from the date of the termination of the agency, and not from the date of the agent's death —*Arunachellam v. Raman Chetty*, 16 M.L.T 614, 27 I.C. 807; *Parthasarathi Appa Rao v. Subba Rao*, 50 Mad 249, A I.R 1927 Mad 157, 99 I.C 456; *Parthasarathi v Turlapati Subba Rao*, 47 M L J 483, A I.R. 1924 Mad 840

In *Harender v Administrator-General*, 12 Cal. 357, and *Mathura v. Chhedu*, 39 All 355, it was held that a suit against the agent's legal representatives for recovery of the amount not accounted for by the agent would fall under Article 116, if the contract of agency had been registered.

415. Demand and refusal—There must be *express demand* and refusal; it cannot be supposed that demands were going on as long as the business was in existence. In the absence of any evidence of demand and refusal, limitation runs from the termination of the agency—*Nabin Chandra v. Chandra Madhab*, 44 Cal. 1 (8) P C (reversing *Chandra-madhab v. Nabin*, 40 Cal 108); *Bhabatarini v. Sheikh Bahadur*, 30 C.L.J. 90, 53 I.C. 675. If there has been a demand for accounts and the agent has not responded to the call, there is by implication a refusal within the meaning of this Article—*Madhusudan v. Rakhal*, 43 Cal. 248; *Pran Ram v Jagodish*, 49 Cal. 250 (254). This is the case also where the agent has submitted accounts but has failed to explain the account-papers in spite of the principal's demands to do so—*Madhusudan v. Rakhal*, 43 Cal. 248, 19 C.W.N. 1070. Where the agent does not refuse to render an account but promises to submit the same on a certain future date, which however he neglects to do, it must be held that the account was refused at that date and limitation will run therefrom—*Hori Narain v. Administrator*, 3 C.L.R. 446. But it cannot be affirmed as a general fact that the failure of the agent to render accounts necessarily amounts to a refusal, when the agent while in service had been all along saying that he would render accounts. The failure to render accounts on demand may be due to various causes, such as illness, or delay in preparing the accounts, or sometimes procrastination. The question whether the failure to render accounts amounts to a refusal depends upon the circumstances of each case—*Bhabatarini v. Sheikh Bahadur*, 30 C.L.J 90, 53 I.C. 675; *Fatima v. Intiazi*, 1 P.R. 1912, 13 I.C. 930. Where the defendant was asked to render accounts repeatedly, and he put it

off but never refused to render accounts, held that the putting off was equivalent to postponement, and postponement was not tantamount to refusal; on the contrary, it implied an admission that an account was due and would be rendered. In such a case, limitation ran from the termination of the agency—*Saiyad Hasan Imam v. Debi Prasad*, 3 Pat. 546, 5 P.L.T. 303, A.I.R. 1924 Pat. 664, 80 I.C. 956

Where there is a covenant to deliver accounts year by year, the omission to render such accounts amounts to a refusal within the meaning of this Article—*Easin v. Barada*, 11 C.L.J. 43, 5 I.C. 186

Where the defendant is an agent of two joint principals, limitation for a suit for account does not run until there has been a joint demand for account by the principals. A demand for account by one only of the principals will not give a starting point of limitation. In the absence of a joint demand, limitation will run from the termination of the agency—*Jagdish v. Rajo Kuer*, 2 Pat. 585, 4 P.L.T. 531, A.I.R. 1923 Pat. 464.

416. Termination of agency :—Under section 201 of the Contract Act, an agency is terminated, among other ways, by the principal revoking his authority, or by the agent renouncing the business of the agency or by the business of the agency being completed, and it is from this point that time is to begin to run in a suit under this Article—*Venkatachalam v. Narayan*, 39 Mad 376 (378), 28 M.L.J. 140, 26 I.C. 740. In *Babu Ram v. Ram Doyal*, 12 All 541 and *Fink v. Buldeo*, 26 Cal. 715, the Judges expressed an opinion that an agency terminates under this Article only when the sums received by the agent had been fully accounted for by him to the principal. But this is contrary to the terms of this Article, because the words "not accounted for" indicate that the agency may terminate before the moneys are accounted for by the agent. Therefore where the principal revoked the authority of the agent, and the latter handed over charge to his successor, the agency terminated then and there (under sec. 201 of the Contract Act) though the agent has not yet handed over to his principal the money and accounts and passed the accounts—*Venkatachalam v. Narayan*, 39 Mad 376 (dissenting from 12 All 541 and 26 Cal 715 cited above). The agency terminates when the business of the agency has been completed; e.g. when the agent is instructed to buy and sell goods on behalf of his principal, the business of the agency terminates on the agent's carrying out the principal's instructions. And the mere liability to render accounts is not a continuation of the relation between the agent and the principal—*Gordhan Das v. Gokal*, 21 S.L.R. 336, A.I.R. 1926 Sind 264 (following 39 Mad. 376, and dissenting from 12 All 541 and 26 Cal 715).

The question as to when an agency terminates is a question of fact and depends upon the circumstances of each case; not a question of law—*Muthiah v. Alagappa*, 41 Mad 1, *Nagappa v. Chidambaram*, 31 M.L.J. 687, 36 I.C. 662; *Ramanathan v. Kasi*, 31 M.L.J. 685, 36 I.C. 804. It terminates on the date after which there have been no dealings between the parties, even though the agent had not then accounted to the principal for all monies alleged to be due to the latter—*Kuppuswami v. Veerappa*,

v. *Sithammal*, 16 Mad. 311; *Abdul Rahim v. Kirparam*, 16 Bom. 186; *Muhammad v. Mango Mal*, 22 All. 90; *Ikram v. Intizam*, 6 All. 260 (262); *Uma Shankar v. Kalka*, 6 All. 75; *Ramausar v. Raghubar*, 5 All. 490; *Hazari v. Jadaun*, 5 All. 76 (*per* Straight J.); *Bageshra v. Sheo Nath*, 14 A.L.J. 464, 32 I.C. 930. Such a case arises where the instrument is null and void. Such document need not be cancelled or set aside by a suit brought within three years under this Article, and the plaintiff can bring a suit for declaration, possession or other relief without praying for cancellation of the instrument. To such a suit Article 91 does not apply—*Mid. Nazir v. Zulaikha*, 50 All. 510, A.I.R. 1928 All 267; *Krishnadhan v. Brojendra*, 34 C.W.N. 642 (645). Thus, a deed of gift executed by a Hindu widow transferring the bulk of the property to an idol is void and not voidable, a suit to set aside the gift and for possession does not fall under this Article—*Chooramoni v. Baidya Nath*, 32 Cal. 473. A document which was never intended by the executant to be operative and which was not properly signed by him is a nullity; it does not require to be set aside by the person entitled to the possession of the property as against the person in whose favour the document stands—*Banku v. Kristo Govinda*, 30 Cal. 433 (438). An alienation of joint family property by a coparcener without the consent of the other coparceners is void; it is not necessary to have the deed of gift set aside, and Art 91 has no application—*Muktabai v. Karam*, 7 A.L.J. 783, 6 I.C. 841. An alienation of the management of a temple by the trustee is void and need not be set aside; therefore a suit to recover the estate from the alienee is governed by Art. 124, and not by this Article—*Narayana v. Lakshmanan*, 39 Mad. 456 (458). A *benami* conveyance which is an inoperative instrument and which was never intended to be operative need not be set aside. A suit to recover the property comprised in the conveyance is not governed by Art. 91 but by Art. 144 of the Act—*Petherpermal v. Munandy*, 35 Cal. 551 (P.C.); *Sham Lal v. Amarendra*, 23 Cal 460 (469), *Ma Ma v. Mg Shet*, 4 Bur. L.J. 250, A.I.R. 1926 Rang 71, 93 I.C. 197. The alienation of temple property by a trustee is null and void, and need not be set aside, consequently a suit by the succeeding trustee to recover the property is not governed by this Article—*Sheo Shankar v. Ram Senak*, 24 Cal. 77. A suit to recover possession of property alienated by a Hindu widow is not governed by this Article, when the alienation is found to be sham—*Manchcharam v. Panabhai*, 40 Bom 51. Where it is established that the plaintiff by defendant's misrepresentation was got to execute a deed of sale, believing the same to have been a deed of a different kind, the transaction is void and not voidable only, and Art. 91 has no application to a suit to recover the property which passed under the void sale-deed—*Banni Bibi v. Siddik Husain*, 23 C.W.N 93, 49 I.C 76. Where the plaintiff brought a suit for a declaration that a deed of gift executed by her was void and inoperative, as she signed the deed believing, on account of a fraud and misrepresentations of the defendant, that it was only a power of attorney, and she also prayed for a declaration of title in the properties gifted, held that the deed of gift was void *ab initio*, and did not require to be set aside. Consequently, the suit was governed not by

Art. 91 or 95 but by Article 120—*Sarat Chandra v. Kanai Lal*, 26 C.W.N. 479, A.I.R. 1921 Cal. 786, 70 I.C. 525, *Brindaban v. Dhruba*, 49 C.L.J. 540, A.I.R. 1929 Cal. 606. Where the claim was not to set aside the sale deed, but for a declaration that from its very inception it was a sham transaction, *held* that there was no necessity for the plaintiff to have the deed set aside, and therefore this Article did not apply—*Jagardeo v. Phulhari*, 30 All. 375; *Md. Nazir v. Zulaikha*, 50 All. 510, A.I.R. 1928 All. 267, 109 I.C. 54. Where the plaintiff (a person of weak mind) was got to execute a deed of sale or mortgage in favour of the defendant by fraud of the latter, and no consideration passed under the deed, *held* that the deed was a nullity and it is not necessary for the plaintiff to have it set aside under this Article; he can bring a suit to recover possession under Article 144—*Sundaram v. Sithammal*, 16 Mad. 311; *Abdur Rahim, v. Kripparam*, 16 Bom. 186; *Boo Jinathoo v. Shah Nagar*, 11 Bom. 78. Where during the minority of the plaintiff a property belonging to him was alienated to the defendant by a person who was not his lawful guardian, and without any necessity, the deed was void, and a suit by the minor after attaining majority is governed by Art. 142, and not by Article 91 or 44—*Sajjad Ali v. Zulfikar*, 33 I.C. 943, 83 P.R. 1916; *Anandappa v. Totappa*, 17 Bom. L.R. 1137 (Note) 33 I.C. 441; *Ramausar v. Raghubar*, 5 All. 490; *Narsagauda v. Chawagauda*, 42 Bom. 638 (F.B.); *Uttam Singh v. Barkat Ali*, 15 P.R. 1913, 19 I.C. 235, *Sardar Shah v. Haji*, 182 P.L.R. 1908, 1 I.C. 545, 28 P.R. 1909; *Husain v. Rajaram*, 10 N.L.R. 133, 26 I.C. 813. Where a sale-deed was executed by persons purporting to be guardians, but no consideration passed under the sale deed, and the defendant never obtained possession under it, no suit is necessary to set aside the deed; Article 144 and not 91 applies—*Nawab Mir Sayad v. Yasin Khan*, 17 Bom. 755 (758). Where a deed of gift is executed by a person governed by the Muhammadan law, and the possession of the property comprised in the gift has not been delivered, the gift would be void *ab initio*, and no question of limitation will arise as regards a suit to set aside the deed of gift. But if afterwards the defendant takes possession, the gift becomes operative by law, and limitation (Art. 91) for a suit to set aside the gift runs from the moment the defendant takes possession—*Mulani v. Maula Bakhsh*, 46 All. 260 (262, 263), A.I.R. 1924 All. 370. Where the plaintiff executed a registered sale-deed in favour of the defendant, and the defendant executed a receipt in favour of the plaintiff stating "I shall without any objection give up your land at any time you may ask me to give up" and it was proved that no consideration passed under the sale-deed, *held* that the sale-deed was a mere paper transaction and inoperative, and a suit to recover possession of the land was governed by Article 144 and not by Art. 91—*Sangana v. Huchangowda*, 48 Bom. 166, A.I.R. 1924 Bom. 174. Where a zemindar granted a village to a person for life for his maintenance, but the grantee gave a permanent lease of the village, *held* that after the death of the grantee the lease became spent and void and not merely voidable, and a suit by the zemindar to recover possession from the lessee was not governed by Article 91—*Beni Pershad v. Dudhnath*, 27 Cal. 156 (165) (P.C.).

(2) *Secondly*, this Article does not apply where the transaction, though a voidable one, does not require to be set aside through the intervention of the Court. Thus, where the certificated guardian of a minor had granted a perpetual lease of the minor's property without the sanction of the Court, the transaction is a voidable one, and it is not necessary for the minor (after attaining majority) to bring a suit to have the instrument of lease cancelled. He can simply repudiate the transaction and bring a suit for possession—*Abdul Rahman v. Sukhdayal*, 28 All. 30. So also where a widow had granted a lease for a period extending beyond her own life, a suit by the reversioner to recover possession of the property is governed by Art. 141 and not by this Article. Such an alienation is voidable at the election of the reversionary heir, who may treat it as a nullity without the intervention of the Court, and he can show his election to do so by commencing an action for recovering possession of the property; the cancellation of the lease is not a condition precedent to the right of action of the reversionary heir—*Bijoy Gopal v. Krishna Mohishi*, 34 Cal. 329 P.C. (reversing *Bijoy Gopal v. Nilratan*, 30 Cal. 990); *Harihar v. Dasarathi*, 33 Cal. 257; *Rakhmabai v. Keshab*, 31 Bom. 1. Similarly, where a Hindu widow in possession of her husband's estate sold the property and then adopted the plaintiff and died, a suit by the adopted son to recover possession of the estate from the purchaser was not governed by Article 91. There is no essential difference between the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption, and the position of a reversioner seeking to enforce his rights with regard to the property alienated by the widow before her death. The adopted son was not required to set aside the sale any more than a reversioner. The suit was governed by Article 144 and not by Article 91—*Hanamgowda v. Irgowda*, 48 Bom. 654, 26 Bom. L.R. 829, A.I.R. 1925 Bom. 9. A suit by a landlord to avoid a transfer made by a tenant in contravention of section 43 of the C. P. Tenancy Act is not governed by this Article. The landlord is not bound to set aside the transfer and may sue for possession treating the transferee as a trespasser—*Sagunchand v. Chhabilram*, 18 N.L.R. 11, A.I.R. 1922 Nag. 60. The members of a tarwad need not sue to set aside an alienation made by the karnavan, but can sue to recover possession on the strength of title, because the alienation is not binding on the tarwad. Consequently, Article 91 does not apply to a suit to recover possession of the property alienated, but Article 144 would apply—*Kanna Panikkar v. Nanchan*, 46 M.L.J. 340, A.I.R. 1924 Mad. 607, 78 I.C. 564.

(3) *Thirdly*, this Article does not apply where the suit was not to cancel or set aside an instrument, but only to amend it by substituting the name of the plaintiff for the name of another person mentioned in the deed. Thus, where the plaintiff asks for a declaration that the first defendant whose name appears as lessee in a certain lease-deed has no interest under the lease, and that the person really interested under the lease is the plaintiff himself for whom the first defendant acted as *benamidar*, held that the suit does not fall under this Article but Art. 120, as the plaintiff does not ask to annul the lease itself—*Basant Lal v.*

Chidammi, 35 All 149 Similarly, this Article does not apply where the plaintiff does not seek to *cancel* the instrument but simply asks for a declaration that his own interests are not affected by it. Thus, where a relation of the plaintiff executed in favour of the defendant a sale-deed by which he professed to transfer the whole of a joint family property, one-fourth of which belonged to the plaintiff, and the plaintiff brought a suit asking that he might be maintained in his joint possession of the property by cancellation of the deed so far as it is injurious to his rights, *held* that the suit was not one to *cancel* the sale-deed, because the plaintiff cannot dispute the validity of the deed except in so far as it affects his rights. Article 120 governs the case—*Din Dayal v. Har Narayan*, 16 All. 73

(4) *Fourthly*, this Article does not apply where the plaintiff was not a party to the instrument sought to be avoided. This Article is restricted to a suit between the parties to the instrument or their successors-in-interest Where the instrument was not executed by the plaintiff (or his predecessor) *he is not bound to set it aside* and this Article does not apply—*Vithu v. Devidas*, 15 N L R 55, 51 I C 943; *Kunjilal v. Chandra*, 17 N L R 169, 64 I C 775; *Ganapathi v. Sivamalai*, 36 Mad. 575. Thus, where a suit by a mortgagee is in effect one for a declaration that a sale by his mortgagor to a third party is null and void, Article 120 applies to the case and not Article 91—*Misan v. Shwe Ba*, 1 Bur. L J 106, A.I.R. 1923 Rang. 82 A land belonging to defendant No. 1 was mortgaged by him to defendant No. 5, and afterwards the plaintiff purchased it at a sale in execution of a certain decree against defendant No. 1; the plaintiff thereupon brought a suit for a declaration that the mortgage was fraudulent and without consideration *Held* that the suit does not fall under this Article. "No doubt a declaration that defendant No. 5 has no title to the land would be to that extent equivalent to setting aside that mortgage, but such declaration would still leave the deed to operate as between the parties thereto, and therefore would not amount to cancelling the deed. Moreover the plaintiff has no title or interest to set aside the deed as between the parties thereto"—*Pachamuthu v. Chinnappan*, 10 Mad. 213 (215); *Unni v. Kunchi*, 14 Mad. 26; *Uma Shankar v. Kalka Prasad*, 6 All 75. A suit by a reversioner to obtain a declaration that a *kanom* executed by the widow in favour of the defendant is not binding on the estate or on the plaintiff is not governed by this Article, as the plaintiff was not a party to the deed—*Puraken v. Parvati*, 16 Mad 138 (following *Pachamuthu v. Chinnappan*, 10 Mad. 213) The mortgagor, in contravention of the terms of the mortgage, granted a perpetual lease of the mortgaged property, and the mortgagee brought a suit upon the mortgage and in execution of a decree brought the mortgaged property to sale which was purchased by the plaintiff. The plaintiff on becoming aware of the perpetual lease sued for its cancellation and for a declaration that the defendant (lessee) had no right to interfere with or obstruct the plaintiff in respect of the property in question *Held* that Art. 91 did not apply but Art. 120; the prayer for the cancelment of the deed could be treated as merely incidental to the main relief (declaration) asked. "What the

plaintiff wants is a declaration that the shadow cast upon his title may be dispersed. It is otherwise nothing to him whether the lease between the mortgagor and the defendant is or is not binding upon those who were parties to it"—*Muhammad Baqar v Mango Mal*, 22 All. 90 (93).

Will :—This Article does not apply to a suit to set aside a will—*Sayd Ali v. Ibad Ali*, 23 Cal. 1 (at p. 10) (P.C.); *Firoz v. Sultan*, 96 I.C. 835, A.I.R. 1926 Lah. 635. Article 120 applies to the suit—*Firoz v. Sultan*, (supra).

Award :—An award is an instrument within the meaning of Art. 91, and the plaintiff cannot impeach the decree incorporating the award, unless he can show that a suit to set aside the award was brought within the period prescribed by Art. 91—*Nidhan Singh v. Sassoon & Co*, 28 P.L.R. 106, A.I.R. 1927 Lah. 172, 100 I.C. 596

421. Where article applies :—Article 91 applies to those cases where the prayer for cancellation of the instrument is an essential part of the relief claimed *i.e.*, where it is necessary for the plaintiff to set aside the instrument before he can obtain the other relief claimed by him—*Amir v. Mussammatussissa*, 75 P.R. 1896. Where an instrument is *not void but voidable*, and can be avoided at the option of the party aggrieved, he must come to Court within three years to have it set aside—*Md. Nazir v. Zulaikha*, 50 All. 510, A.I.R. 1928 All. 267, 109 I.C. 54. If the immoveable property cannot be recovered until a document is set aside, it is necessary to bring a suit to set it aside, and such suit will fall under this Article, even though it is framed as a suit for recovery of possession of the property—*Banku Behari v. Krishto Gobindo*, 30 Cal. 433 (436). This Article can apply to suits in which the documents sought to be set aside were intended to be operative against the plaintiff, and would remain operative or would defeat his suit to recover possession of any property, if they are not set aside—*Sham Lal v. Amarendra*, 23 Cal. 460 (466), *Jan Mahomed v. Datu Jafar*, 38 Bom. 449, 22 I.C. 195. Arts. 91 and 92 are particularly concerned with instruments which if allowed to stand unchallenged once they become known, might become important evidence against the person whose rights they purported to affect—*Raghubar v. Bhikya*, 12 Cal. 69 (74).

Thus, a deed of relinquishment which operates to put an end to the plaintiff's right to certain property is not void *ab initio* but is voidable only, *i.e.*, it is a valid document and binding on the plaintiff until it is set aside, and the plaintiff's right to recover the property will be barred, if he fails to bring a suit to set aside the deed within the time prescribed by this Article—*Rameshwar v. Lachmi Prosad*, 31 Cal. 111. Where a sale becomes voidable by subsequent failure of consideration, the title nevertheless passes to the purchaser by such sale, and the vendor or other persons claiming to recover the property must get the sale avoided within the period prescribed by this Article, before they can recover possession—*Govindasami v. Ramaswamy*, 32 Mad. 72. When in a suit for possession of immoveable property it is necessary that a lease-deed executed by the plaintiff's predecessor must be first set aside before possession can be claimed, the suit must be governed by this Article—*Raja Rajeswara v.*

Arunachellam, 38 Mad. 321. Where a sale-deed is executed by the plaintiff or his predecessor-in-title, and some consideration (though inadequate) passes, and the nature of the transaction shows that it is not void but voidable only, the suit is governed by Article 91, even though the plaintiff sues for possession—*Janki Kunwar v. Ajit Singh*, 15 Cal. 58 (P.C.). A Muhammedan executed a deed of gift of his property, under which possession was taken by the donee. The donor during his lifetime never took any steps to have the deed set aside. A suit was brought by his heir claiming a share in the donor's estate by right of inheritance and by having it declared that the deed was procured from the donor by fraud and undue influence. It was held that the cancelment of the deed was a substantial and necessary incident of the claim, and the suit fell under this Article, notwithstanding that the plaintiff chose to call the suit one for possession—*Hasan Ali v. Nazo*, 11 All. 456. A suit by the reversioners to set aside an *ikrarnama* executed by the last male owner (and which is binding on the reversioners) is governed by Art. 91 and not by Art. 144, even though the prayer in the suit is for recovery of possession of the property comprised in the *ikrarnama*—*Mahabir v. Harrihur*, 19 Cal. 629. Where a Hindu father executes a sale-deed under undue influence, and has not avoided it within the time fixed by this Article, his sons cannot recover the property—*Narogopal v. Paragowda*, 41 Bom. 347, 39 I.C. 23; *Rajarajeswara v. Kuppuswami*, 41 M.L.J. 474, A.I.R. 1921 Mad. 394, 68 I.C. 352. Where a person is, *prima facie*, bound by a decree, he cannot, by suing ostensibly for possession, ignore the decree and evade the operation of law; and where such a decree is an impediment to the plaintiff's way in obtaining relief inconsistent with it, he must bring his suit within the period prescribed by law for setting aside a decree—*Hitendra v. Rameshwar Singh*, 4 Pat. 510, 6 P.L.T. 634, A.I.R. 1925 Pat. 625, 88 I.C. 141 (per Das J.). Where the cancellation of an instrument is the substantial relief sought, and the recovery of the property is only an incidental or auxiliary relief thereto, the suit falls under this Article—*Rampal v. Balbhaddur*, 25 All. 1 (P.C.). A suit to set aside a sale, under sec. 90 of the Probate and Administration Act, 1881 (sec. 307 of the Indian Succession Act, 1925) is governed by this Article, the sale being voidable only, and not void altogether—*Ma Ken v. Ma Bwin*, 5 Rang. 206, 103 I.C. 264, A.I.R. 1927 Rang. 186.

In some cases, the broad proposition has been laid down that Art. 91 is intended to apply to suits of the kind mentioned in sec. 39 of the Specific Relief Act, and to cases where the plaintiff seeks to cancel or set aside an instrument which he has been induced by misrepresentation, concealment of facts or other means of like kind to enter into, or where the cancellation or setting aside of an instrument is the only relief prayed for—*Hazari v. Jafsun*, 5 All. 76; *Sobha v. Sahodra*, 5 All. 322; *Uma Shankar v. Kalka*, 6 All. 75; *Baktrari v. Kharsetji*, 27 Bom. 560; *Saidar v. Akbar*, 5 I.C. 497.

422. Starting point of limitation :—The words "when the facts entitling the plaintiff to have the instrument cancelled or set aside"

became known to him" must be construed to mean "when, having knowledge of such facts, a cause of action has accrued to him, and he is in a position to maintain a suit." In this case the defendant had on the 1st December, 1875 transferred certain property subject to attachment before judgment in a suit which both the lower Courts dismissed but which the High Court decreed in favour of the plaintiff on the 7th August 1876. The present suit for cancellation of the transfer was brought more than three years after the plaintiff knew of the transfer, but within three years from the date of the decree of the High Court. *Held* that the suit was within time, as the plaintiff's cause of action arose on the date of the High Court's decree—*Tawangir v. Kura Mal*, 3 All. 394. Where the plaintiff and his guardian were perfectly aware of the facts entitling them to set aside an award, the plaintiff must prove that he attained majority within three years before the suit. Limitation ran from the date of the award and not from the date when the Court refused to file it—*Kirkwood v. Maung Sing*, 5 Rang 186 (P.C.), A.I.R. 1925 P.C. 216, 89 I.C. 773.

In a suit to set aside a deed executed by the plaintiff himself, on the ground of undue influence and fraud, the facts relied upon by the plaintiff (i.e., undue influence, etc.) were known to him from the date of the instrument; therefore limitation would begin to run from that date—*Janki v. Ajit Sing*, 15 Cal. 58 (P.C.); *Ram Sumran v. Sarjoo*, 4 Luck. 270, 114 I.C. 806, A.I.R. 1929 Oudh 67 (71), 5 O.W.N. 1062. If, however, the undue influence continues to be exercised after the execution of the instrument, limitation runs only when the influence ceases and the plaintiff may be said to have full knowledge of all the matters—*Rajeswara v. Rajagopala*, 1917 M.W.N. 906, 43 I.C. 164. No laches is attributable to the donor until he is sufficiently acquainted with his rights to enable him to assert them, and until he is free from the influence which invalidates the gift—*Allcard v. Skinner*, (1887) 36 Ch.D. 145 (163) (*per Kekewich J*). The word "plaintiff" as defined in sec. 2 (8) includes any person through whom the present plaintiff derives his right to sue. Therefore, if a deed had been executed by the plaintiff's predecessor-in-title through fraud and undue influence, and that person had failed to bring a suit to set aside the deed on the ground of fraud etc. within three years from the date of execution, the right of the plaintiff would likewise be barred—*Ram Sumran v. Sarjoo*, *supra*.

Under the Mahomedan Law, a gift becomes operative only after delivery of possession; therefore the cause of action for a suit to set aside a gift arises not on the execution of the deed of gift but from the moment when by delivery of possession it becomes operative in law—*Meda Bibi v. Imaman*, 6 All. 207 (210); *Mulani v. Maula*, 46 All. 260 (263).

Where the plaintiff executed a sham sale-deed in favour of his sons, and they began to set up a title under the deed, the cause of action for a suit for its cancellation would arise not from the date of the sale-deed, but from the date the plaintiff apprehended injury to his interest i.e., the date when the plaintiff began to set up a title under the deed—*Singarappa v.* 349. In a suit by the mortgagor against

- 92.—To declare the for- Three When the issue or re-
 gery of an instru- years. gistration becomes
 ment issued or re- known to the plain-
 gistered. tiff.

424. Application of Article .—Arts 91 to 93 apply to suits brought expressly to cancel, set aside or declare the forgery of an instrument, but where some substantial relief (e.g., possession of property) is sought and the cancellation or declaration is subservient or merely ancillary and not necessary to the granting of such relief, these Articles do not apply—*Abdul Rahim v. Kirparam*, 16 Bom 186 (189). Thus, a suit by the plaintiff for possession and to set aside on the ground of forgery a deed of sale alleged to have been executed by his father in favour of the defendant is governed by Art 144 and not by Article 92 or 93—*Trilochan v. Nobolishare* 2 C L R 10 But if the relief asking for a declaration that the document is forged is the principal relief and any other relief is merely subsidiary to it, the suit falls under this Article—*Muradan v. Raghunandan*, A.I.R 1927 All. 826 (827), 102 I.C. 287.

425. "Issued"—An *anumatipatra* (deed of permission to adopt) was given to a widow by her husband. She adopted a boy, and the reversionary heirs brought a suit, to set aside the adoption on the ground of forgery of the *anumatipatra*. Held that the words *issued* was intended to refer to the kinds of documents to which people commonly apply that term in business, and that an *anumatipatra* could not be said to be "issued" when an adoption was made under it; therefore this Article did not apply to the suit. Article 93 also did not apply because it was very difficult to say that an adoption followed by nothing more was in any sense an enforcement of power against other persons within the meaning of that Article. Art. 118 applies to the suit—*Hurri Bhushan v. Upendra Lal*, 24 Cal. 1 (P.C.) A suit to declare an unregistered will as forged and beyond the power of the testator to make, is governed by Art. 120. Art 92 does not apply to the case as the will is neither 'issued' nor registered—*Gauhar v. Ghulam*, 1009 P.L.R. 82, 4 I.C. 923.

- 93.—To declare the for- Three The date of the attempt.
 gery of an instru- years.
 ment attempted to
 be enforced against
 the plaintiff.

426. Application of Article :—This Article applies to suits brought expressly to declare the forgery of an instrument. Where the declaration is an ancillary relief and only incidental to a substantial relief claimed, this Article will not apply—*Abdul Rahim v. Kirparam*, 16 Bom. 186 (189). For instance, where the suit is one for possession, and the plaintiff avers that the sale-deed relied on by the defendant is a forgery this Article would not apply—*Narayanan v. Kannammal*, 28 Mad. (343). Or, where the suit is for declaration of plaintiff's title to a

property, and to set aside a will which the plaintiff alleges to be a forgery, the suit is not governed by the three years' rule under this Article—*Nistarini v. Anundomoyi*, 2 C.L.R. 561. See also *Trilochan v. Nobokishore*, 2 C.L.R. 10, cited under Art. 92.

427. Attempt to enforce :—An attempt to recover rent under a forged lease is an attempt to enforce it; but an attempt to have the lease recorded under the Bombay Record of Rights Act (IV of 103) is not such an attempt—*Achyut v. Gopal*, 40 Bom. 22 (27). Similarly an attempt to register a document is not an attempt to enforce it.—*Ibid.* An adoption by the widow by virtue of an *anumatipatra* (deed of authority to adopt) cannot be said to be an enforcement of the *anumatipatra* against the reversionary heirs—*Hurri Bhushan v. Upendra*, 24 Cal. 1 (P.C.) cited under Art. 92. An attempt to register a document is not an attempt to enforce it against any person's right—*Kamalanadhan v. Sattiraju*, 32 I.C. 99 (Mad.). A widow applied for a succession certificate to enable her to collect the debts due to her deceased husband, stating in her petition that her husband left no heirs nearer to herself, and she based her claim to the certificate expressly on the ground that she was her husband's widow and as such entitled to the certificate under the Hindu law. In the petition she made mention of a will and stated that under it she was the legatee of her deceased husband but nowhere did she base her right to collect the debts upon her position as legatee. In a subsequent suit by the reversioners for a declaration that the will was a forgery, it was held that the mere mention of the will in a superfluous paragraph of the application for succession certificate was not an attempt on the part of the widow to enforce the will against the reversioners. The suit therefore did not fall under this Article—*Ibid.* So also, the mere mention of a will in a written statement filed by the widow in a previous suit brought by the reversioners, in which the genuineness of the will was not the point at issue, and which was dismissed on other grounds, does not amount to an attempt on the part of the widow to enforce the will against the reversioners, and therefore a subsequent suit by the latter to declare the invalidity of the will is not governed by this Article and is not barred if brought more than three years from the date of the written statement filed by the widow in the previous suit—*Achanna v. Seethamma*, 40 M.L.J. 348, A.I.R. 1921 Mad 545, 62 I.C. 531.

428. Limitation :—The period of limitation will be calculated from the date of the attempt, even though that attempt might not have been known to the plaintiff—*Nistarini v. Anundmoyi*, 2 C.L.R. 561. The period must be calculated from the first attempted enforcement of the instrument and not from the date of any subsequent attempt, though the defendant might not have sought in his first attempt to obtain the entire fruits thereof—*Fakharooddeen v. Pogose*, 4 Cal. 209. Where a person claiming under a deed of sale wants to be made a party in a suit in order to enforce his claim, the date of the order of the Court making him a party is the "date of the attempt" within the meaning of this Article, and a suit to declare the forgery of the deed of sale must be brought

a three years from that date—*Fakheruddin v. Official Trustee*, 8 175 (P.C.)

- For property which the plaintiff has conveyed while insane. Three years. When the plaintiff is restored to sanity, and has knowledge of the conveyance.
- To set aside a decree obtained by fraud, or for other relief on the ground of fraud. Three years. When the fraud becomes known to the party wronged.

429. Scope of Article—This Article is not intended to apply suits for possession of immoveable property when fraud is merely a part of the machinery by which the defendant has kept the plaintiff out of possession. It applies only to cases where a party has been by means of fraud induced to enter into some transaction, execute some deed, or perform some other act, and desires to be relieved from the consequences of that act—*Chander Nath v. Tirthanand*, 3 Cal. 504 (507); *Kaliprasanna Haripada*, 34 C.W.N. 801 (805, 806). This Article is limited in its application to cases where the relief is claimed on the sole ground of fraud. It does not apply where fraud is not the basis of the relief, but is only a collateral matter, although the defendant may have acted fraudulently in obtaining the relief—*Burjorji v. Dinonath*, 25 Cal. 49; *Jamsetji v. Hirjibhai*, 37 Bom. 158. In other words, this Article does not apply where the relief claimed on the ground of fraud is merely ancillary to some main relief, as for instance where the main relief is the declaration of the plaintiff's title to the property, but there is also a prayer in the plaint for a declaration of a deed fraudulent and void against the plaintiff—*Burjorji v. Dhunbai*, 16 Bom. 474; *Sarat v. Kanai Lal*, 26 C.W.N. 479, A.I.R. 1921 Cal. 786, 70 I.C. 100. It does not apply where the auction purchaser brings a suit for possession of immoveable property against the mortgagee from the judgment-debtor, on the ground of avoidance of the mortgage as being fraudulent fictitious and void against the plaintiff—*Uma Shankar v. Kalka*, 6 All. 75. But it would be laying down too wide a proposition to say that a suit for possession or governed by Art. 95 at all. It seems clear that when a party is in fact bound by a fraudulent decree, he cannot by suing ostensibly for possession ignore that decree and thereby evade the operation of Art. 95. Where there is such a decree standing in the way of his obtaining relief which is inconsistent with that decree, he must first of all bring a suit under Art. 95 to get the decree out of the way; he cannot ignore the decree and bring a suit for possession on the basis of title. Otherwise, if that decree could be ignored altogether, there would be no use of Art. 95—*Kaliprasanna v. Haripada*, 34 C.W.N. 801 (803).

Again, this Article does not apply unless the plaintiff was a party to the decree or to the transaction in which the fraud was committed.

under this Article—*Nidhan Singh v. Sassoon & Co.*, 28 P.L.R. 106, A.I.R. 1927 Lah. 172, 100 I.C. 596.

431. Knowledge of fraud :—So long as a person upon whom fraud has been practised remains in ignorance of it, no time will run against him; but when he has acquired knowledge of such fraud, he must, within three years from the date of obtaining such knowledge, come into Court for relief—*Muhammad Baksh v. Mahomed Ali*, 5 All 294. The knowledge predicated by the terms of this Article is not mere suspicion, but such *definite* knowledge as enables the person defrauded to seek his remedy in Court—*Natha Singh v. Jodha Singh*, 6 All. 406; *Indra v. Rooka*, 3 I C 316. The defendant setting up the defence of limitation must shew that the plaintiff had clear and definite knowledge of the facts which constitute the fraud at a time which is too remote to allow him to bring the suit. The mere fact that some hints and clues reached the plaintiff which if vigorously and acutely followed up might have led to a complete knowledge of the fraud, is not enough to constitute clear and definite knowledge of it—*Rahimbhoy v. Turner*, 17 Bom 341 (P.C.), affirming 14 Bom. 408. When it is doubtful at what precise time the fraud became known to the plaintiff, the *onus* is on the defendant to shew that the suit is out of time—*Punnayil v. Raman*, 31 Mad. 230 (233).

432. Effect of bar of limitation :—Although a person may be debarred by lapse of time from bringing a suit as *plaintiff* for setting aside a decree obtained by fraud, still he can, as a *defendant*, in an action in which such decree is used as evidence against him, shew that it was obtained by fraud—*Rajib Panda v. Lakhan*, 27 Cal. 11 (23).

96.—For relief on the Three When the mistake be-
ground of mistake. years. comes known to the
plaintiff.

433. Scope :—This Article is limited in its application to cases of mistake committed in transactions arising in the course of relations which are more or less *contractual* in character, and the Article in any event has no application to a case where the mistake is on the part of the *defendant*, and not on the part of the *plaintiff*. Therefore, where the plaintiffs and the defendants were owners of adjoining coal-lands, and the defendants, due to a mistake regarding the boundary line between the collieries, trespassed into the plaintiff's colliery and extracted coal therefrom, whereupon plaintiff sued the defendants for damages, *held* that this Article did not apply, as the suit was based on *torit*, and as the mistake was not on the part of the *plaintiff*—*Panna Lal v. Adjai Coal Co. Ltd.*, 31 C.W.N. 82 (95), 101 I.C. 62, A.I.R. 1927 Cal. 117. (This case has been reversed by the Privy Council in 34 C.W.N. 483 on another ground).

Cases :—A suit to recover money alleged to have been paid by the plaintiffs to the defendants in excess of the sum actually payable is governed by this Article rather than Article 62—*Tofa Lal v. Syed Moinuddin*, 4 Pat. 448, A.I.R. 1925 Pat. 765, 93 I.C. 129; *Mathuranath v. Debendranath*, 12 Cal. 533. Thus, the defendants who purchased some

bales of articles from another sold the same to the plaintiff and afterwards it was found that some of the bales did not contain the stipulated number of pieces. The plaintiff thereupon sued the defendants for the price of the pieces short delivered i.e. for refund of the excess price paid. *Held* that the suit fell under this Article, not under Art. 62, and limitation ran from the date of his knowledge of short delivery—*Ramiah v. Sadashiv Mudaliar*, 48 Mad. 925, 49 M.L.J. 228, A I R. 1925 Mad. 1255.

A suit for amendment or rectification of a lease on the footing of a common mistake of the lessor and the lessee under which some land was wrongly included in the lease, is governed by this Article—*Bijoy Chand Mahatab v. Secretary of State*, 48 I.C. 972 (Cal). A suit for possession of immovable property, when relief is claimed on the ground of mistake, falls under Article 96 and not Article 144, and it is immaterial whether the mistake was made by the plaintiff or by a third party—*Sultan Mahomed v. Alim Khan*, 1905 P.L.R. 3. Where compensation for acquisition of land was awarded by mistake to a person who was not entitled to it, a suit by the real owner to recover the money falls under this Article—*Viraraghava v. Krishnasami*, 6 Mad 344. The mistake contemplated by this Article may be that of the plaintiff or of a third party through which the plaintiff's rights have been affected—*Ibid* (at p. 350). A suit by a creditor for setting aside a discharge made by him on the ground of mistake is governed by this Article—*Madras C. S. & S. Factories v. William Show*, 14 M L J. 443.

The plaintiff mortgaged seven out of his eight properties, but by a mistake made by the plaintiff in the bond, all the eight properties were sold under a decree on the mortgage, and purchased by the defendant. The plaintiff now brought a suit to recover from the defendant the value of the eighth property which was not the subject of the mortgage. *Held* that since the plaintiff was solely responsible for the mistake, he cannot treat the sale as a nullity and ignore it, it is necessary for him to get the sale set aside before he is entitled to any relief on the ground of mistake. The suit therefore falls under Article 12 and not under this Article—*Nagabhatta v. Nagappa*, 46 Bom 914. A suit for refund of advance paid under a void agreement (viz. an agreement to transfer a non-transferable property) falls under this Article, and the period of three years is to be counted from the date when the agreement is discovered to be void, which in this case is the date of the agreement, because when the agreement is one forbidden by law, the plaintiff must be deemed to have been aware of the fact when he entered into it. The period of limitation may also be counted from the date when the contract was declared to be void in a previous suit between the parties, because it was suggested in this case that the plaintiff was unaware of the illegality of the agreement until the Court gave its decision in that suit—*Aurjaprabhakara v. Gummudu Sanjasi*, 48 M.L.J. 598, 88 I.C. 557, A I R. 1925 Mad 885. A Hindu, while next reversioner to an Oudh estate purported to sell half the estate, declaring by the sale deed that when he succeeded to the estate on the death of the widow he would put the vendee in proprietary possession. After the death of the widow, the purchaser sued the vendor for possession or alternatively to recover the purchase money with interest. *Held* that

the claim for possession could not be granted as there was no effectual transfer of the estate, which was only an expectancy at the time of the sale; that the vendee was entitled only to recover the purchase money; and that the period of limitation for the claim to recover the purchase money ran from the date when the misapprehension of the vendor as to his right to sell the estate was discovered by the plaintiff, which was not earlier than the time at which his demand for possession was resisted i.e., the time when the sale was declared to be void in this suit—*Harnath v. Indar Bahadur*, 45 All. 179, 184 (P.C.).

The mistake may be of law or of fact. In England it has been held that the Court has power to relieve parties against mistakes of law as well as against mistakes of fact—*Stone v. Godfrey*, (1854) 5 D.M. & G. 76 (90). But under the Indian law, if a mistake is a pure mistake of law, and not a mistake bearing upon the private or special right of the petitioner, and if such mistake of law results in the payment by one person to another making it inequitable that the payee should retain the money, still it is no ground for relief—*Appavoo v. S. I. Ry. Co.*, 56 M.L.J. 269, A.I.R. 1929 Mad. 177 (178).

If there is mutual mistake, i.e., if both the plaintiff and the defendant are under a mistake of fact, there can be no fraud, consequently the suit falls under Art 96 and not Art 95—*Martand v. Dhondo*, 45 Bom. 582.

Suit to set aside decree.—This Article is intended to apply to those cases in which the Courts are asked to relieve parties from the consequences of mistakes committed by them in the course of contractual relations. It does not refer to a suit to set aside a decree on the ground of mistake made by the plaintiff. Such a suit is not at all maintainable—*Ramzan Khan v. Yakub Khan*, 11 I.C. 537 (Oudh). This Article is so general in its character that it can hardly be said that it affords any authority for holding that a suit to set aside a decree on the ground of mistake is maintainable. The mistake can be rectified by proceeding under sec 108 C. P. Code (1882) or by way of appeal or review—*Chand Mean v. Asima Banu*, 10 C.W.N. 1024 (1025, 1026).

While Article 95 refers to a suit for setting aside a decree on the ground of fraud, the words used in Article 96 refer to relief on the ground of mistake; it does not refer to a suit to set aside a decree on the ground of mistake and obviously refers to a suit for relief on the ground of mistake not made in a decree—*Jogeshwar v. Ganga Bishnu*, 8 C.W.N. 473 (475).

434. Limitation.—Where a plaintiff is mistaken as to his rights, time will only run against him from the discovery of his mistake (and not earlier)—*Brooksbank v. Smith*, (1836) 2 Y. & C. Ex. 58. Time runs as soon as the mistake is known to the plaintiff. Thus, on a partition of family properties between the plaintiff and the defendant, the former got certain properties including a mortgage-debt due to the family. The money due on the mortgage had been long ago paid off by the mortgagor, but both the plaintiff and the defendant were under a mutual mistake that the money was still due. The plaintiff brought a suit against the mort-

gagor, and it was, as a matter of course, dismissed in 1912, and the order of dismissal was confirmed by the High Court on appeal in July 1914. In June 1917 the plaintiff brought the present suit against the defendant to recover from him the share of the mortgage-money. *Held* that as there was a mutual mistake, there was no fraud, that the suit fell under Article 96, and that the suit was barred under this Article, as time ran from the date of the dismissal of the previous suit against the mortgagor in 1912 when the plaintiff was aware of the mistake, and not from the date of the High Court's order in 1914—*Martand v. Dhondo*, 45 Bom. 582 (589), A.I.R. 1921 Bom 184, 23 Bom. L R 69, 61 I C. 34

97.—For money paid Three The date of the failure.
upon an existing years.
consideration which
afterwards fails.

435. Articles 62 and 97 —It seems that many of the cases governed by this Article would also fall under Article 62. But there is distinction between the two, and it is this: where the transaction is *void ab initio*, there cannot be any "existing consideration which afterwards fails" within the meaning of this Article, but the consideration fails *ab initio*; in such a case the suit for refund of money would fall under Article 62 and not under this Article. But where the transaction is not *void ab initio* but *voidable* only, and the consideration fails by reason of some subsequent event, the suit would more properly fall under the present Article than under Article 62. This principle ought to be borne in mind in considering whether the case falls under Article 62 or 67, and this distinction has been clearly pointed out in the cases cited in Note 374 to Art. 62 under heading "Suit for refund of consideration-money."

The leading authority on this subject is the decision of the Privy Council in *Hanuman v. Hanuman*, 19 Cal. 123. In this case, the manager of a joint Hindu family, governed by the Mithila law, sold a portion of the joint family property, but on objection made by the other members of the family to the transfer when the purchaser attempted to take possession, the sale was set aside. The purchaser then brought a suit for refund of the purchase-money. Their Lordships of the Judicial Committee expressed the view that the suit did not fall under Article 62 but under Article 97, and observed (at p. 126): "If there *never* was any consideration, then the price paid by the appellant (purchaser) was money had and received to his account by Dowlat Mandur (vendor). But their Lordships are inclined to think that the sale was not necessarily *void* but was only *voidable* if objections were taken to it by the other members of the joint family. If so, the *consideration did not fail at once* but only from the time when the appellant endeavoured to obtain possession of the property, and being opposed, found himself unable to obtain possession. There was then, at all events, a failure of consideration and he would have had a right to sue at that time to recover back his purchase-money upon a failure of consideration, and therefore the case appears to be within the enactments of Article 97."

Even though a mortgage be void, still if a mortgagee gets possession, it should be held that he has an existing consideration for his mortgage, and it would fail when the mortgagee is finally dispossessed. The suit for recovery of the money falls under this Article—*Ram Harek v. Salik Ram*, 89 I.C. 332, A.I.R. 1926 Oudh 19. Where an agreement to sell is not void *ab initio*, but is afterwards declared to be void by the Court which refuses specific performance, a suit for refund of the consideration is governed by Article 97 and not by Article 62—*Munni v. Kunwar Kamta*, 45 All. 378 (379); *Maung Kyi v. Maunk Kyaw*, 4 Bur. L.J. 197, 93 I.C. 119, A.I.R. 1926 Rang. 7.

436. Suit for refund of purchase money upon failure to obtain possession or subsequent dispossession:—Where the sale is not void *ab initio* but *voidable only*, and the purchaser fails to obtain possession of the property purchased, or obtains possession but is subsequently dispossessed, by reason of a defect of title in the vendor, a suit for refund of the purchase-money is governed by this Article and not by Article 62 as the consideration did not fail *ab initio*, but failed *subsequently* by reason of the purchaser failing to obtain possession or by subsequent dispossession—*Hanuman v. Hanuman*, 19 Cal. 123 (P.C.); *Tulsiram v. Murlidhar*, 26 Bom. 750, *Narsing v. Pachu*, 37 Bom. 538; *Venkatanarasimhalu v. Peramma*, 18 Mad. 173; *Munni Babu v. Kunwar Kamta Singh*, 45 All. 378 (380). See these cases fully cited in Note 374 under Article 62.

But it has been held in several cases of the Madras High Court, that after the passing of the Transfer of Property Act (1882), a covenant of title and quiet enjoyment must be implied in every contract of sale, under sec. 55 of that Act, and therefore a suit by the purchaser for refund of purchase-money on account of failure to get possession is to be deemed as a suit for "compensation for breach of contract in writing registered" (if there is a registered sale-deed) and is therefore governed by Article 116—*Arunachala v. Ramasami*, 38 Mad. 1171; *Kasturi Naicken v. Venkatasubba*, 1 M.L.J. 162; *Narayana v. Peda Rama*, 1 M.L.J. 479; *Chidambaram v. Sivathasamy*, 15 M.L.J. 396, *Nageswara v. Sambasiva*, (1911) 1 M.W.N. 361, 11 I.C. 337; *Krishnan v. Kannan*, 12 Mad. 8. This view is also taken by the Bombay High Court in *Multan Mal v. Budhumal*, 45 Bom. 955 (960). So also, where under a registered usufructuary mortgage, the mortgagor failed to secure the mortgagee in possession whereupon the latter brought a suit for refund of the mortgage-money; it was held that the mortgagor's liability to give possession to the usufructuary mortgagee or in default to repay the mortgage-money was a liability imposed by section 68, Transfer of Property Act, and the suit must be regarded as one for breach of contract in writing registered, governed by Article 116—*Umichaman v. Ahmed*, 21 Mad. 242. (In these cases, the rulings in *Hanuman v. Hanuman*, 19 Cal. 123 P.C. and *Sawaba v. Abaji*, 11 Bom. 475 were distinguished on the ground that the Privy Council case referred to a sale deed executed prior to the passing of the T. P. Act, and the Bombay case was decided before the T. P. Act was extended to that

province). *A fortiori*, where a registered deed of sale contained an *express covenant* to the effect that in the event of a claim being advanced by a co-sharer or in the event of the purchaser losing any part of the property in any other way, he would be entitled to a refund of the consideration and to damages, and the purchaser failing to get possession of part of the property purchased sued for refund of a proportionate part of the consideration money and for damages, *held* that the suit was governed by Article 116 and not by Article 97—*Mul Kunwar v. Chattar Singh*, 30 All. 402; *Ram Jaggi v. Kauleshar*, 30 All. 405 (Footnote). So also, in a case of lease—*Zemindar of Vizianagram v. Behra*, 25 Mad 587 (597).

In *Ramchandar v. Tohfah Bharti*, 26 All 519, where a suit for refund of purchase-money was brought on an *express covenant* in the sale deed whereby the vendor agreed to recoup the purchaser in the event of disturbance of possession, the suit was held to be governed by Art. 97. In a recent Allahabad case, the judges have decided to follow the Privy Council ruling in *Hanuman v. Hanuman*, (*viz.* that Article 97 applies) in preference to the other decisions which are in favour of the application of Art. 116—*Kundan v. Bisheshar*, 50 All 95, A.I.R. 1927 All 734, 25 A.L.J. 841, 103 I.C. 165. But this case has been disapproved of in another recent case of the same High Court—*Hanwant v. Chandi*, 51 All. 651, 27 A.L.J. 433, A.I.R. 1929 All. 293 (295). In the Punjab, however, the T. P. Act does not apply, and there is no implied covenant for title; consequently, a suit for refund of consideration on the ground of the plaintiff's failure to get possession is governed by Article 97 and not by Art. 116—*Partab Singh v. Ganga Singh*, 28 P.L.R. 74. Even in a case where there was an *express covenant* for quiet possession and enjoyment, a suit on the basis of the covenant was held to be governed by Art. 97—*Gopal v. Dhanna*, 9 Lah 191, 29 P.L.R. 208, A.I.R. 1927 Lah. 570 (572), 106 I.C. 804.

But Art. 116 applies when there is a breach of contract on the part of the *defendant*, and not where the breach is committed by the *plaintiff*. If a contract of lease goes off on account of the failure of the lessee (plaintiff) to perform his part of the contract, and the lessor refuses to deliver possession, a suit brought by the lessee, under sec. 65 Contract Act, for refund of the consideration paid by him, falls under Art. 97 and not under Art. 116—*Anant v. Sarup*, 26 A.L.J. 492, A.I.R. 1928 All. 360 (363).

A obtained possession of a certain revenue-paying property under an order passed in mutation proceedings, and whilst in possession collected rents from the tenants and paid the revenue due in respect of the property. But the order in favour of A was subsequently set aside, and he had to relinquish possession and refund to the tenants the rents collected. Thereupon he brought a suit to recover the revenue he had paid during the period of his possession. *Held* that the suit was governed by Article 61 and not by Article 97. The consideration for payment of revenue could not be the realisation of rents from the tenants; the revenue was

paid because the property was liable for revenue and demand was made for it; it was payable by the person in possession whether he had collected rents or not; and the refund of rents cannot be said to be a failure of the consideration. Nor can it be said that the fact that he was in possession was a consideration for the payment of revenue—*Alayar v. Bibi Kunwar*, 42 All. 61 (62, 63).

Suit for refund of advance—Where in a contract of sale of certain premises which were subject to *waqf* the condition was that the vendor should use due diligence in obtaining an order of the Court for sale and take legal advice and that on his failure to do so the vendee could recover the advance money, and it appeared that for 2 years the vendor remained quiet and then mortgaged the property to another who had it sold in satisfaction of the mortgage, held that a suit by the vendee for return of the advance-money was governed by Art. 97, and not by Art. 60 or 115, and the began to run when the contract became impossible of performance *i.e.* when the property was sold away under the mortgage—*Galstaun v. Sahebzadi Mamoodi*, 56 Cal. 455, 33 C.W.N. 115 (116), 117 I.C. 700, A I R. 1929 Cal. 216.

437. Other suits :—The pre-emptor obtained a decree for pre-emption allowing him to purchase the property at Rs 1595. He paid the money to the vendor out of Court. But on appeal the amount was raised to Rs. 1994, and as the amount was not paid within the specified time, the decree for pre-emption became void. A suit brought by the pre-emptor against the vendor, for the refund of the amount of Rs. 1595 fell under this Article or Art 120, and not under Art. 62—*Koji v. Ishar*, 8 All. 273. The plaintiff sued for sale of a mortgaged property on foot of a registered mortgage. The property however, being a cultivatory holding and thus not being liable to sale, the plaintiff in his replication desired a money-decree. There was a further plea of the plaintiff that the defendant had fraudulently represented the property to be alienable property; but no fraud was found to have been proved. Held that the suit did not fall under Article 97, because there was no existing consideration whatever from the very inception of the mortgage, the property in suit being not alienable. The suit fell under Art 116—*Thamman v. Dalchand*, 9 O.L.J. 171, 67 I.C. 595, A.I.R. 1922 Oudh 113

A usufructuary mortgagee assigned the mortgage to another person by an unregistered instrument for a consideration duly paid, and put him in possession. Sometime after, the mortgagor sued both the assignor (mortgagee) and the assignee for redemption, and the Court passed a decree for redemption but refused to recognise the title of the assignee as the deed of assignment was unregistered. The mortgagor redeemed the property by paying the money to the mortgagee (assignor) and got back possession. The assignee who had to give up possession then brought the present suit to recover from the assignor the consideration for the assignment. Held that the suit fell under this Article, and time ran when the assignor received the mortgage-money from the mortgagor. The suit also fell under Art. 62, in as much as the assignor, by receiving

the mortgage-money in fraud of the assignee, had received it for the latter's use—*Sriramulu v. Chinna*, 25 Mad. 396.

When the defendant borrowed money from the plaintiff on an unregistered mortgage and put him in possession, but subsequently taking advantage of the non-registration of the mortgage-deed, put him out of possession, it was held that a suit by the plaintiff for the amount due would be governed by this Article and time ran from the date of dispossession—*Gurmukh v. Chandu*, 183 P.R. 1888. Where goods already paid for are afterwards found to be short delivered, a suit to recover the amount overpaid will be governed by this Article, the date of the failure of consideration being the date of delivery—*Atul v. Lyon*, 14 Cal. 457.

A suit by an auction purchaser against the decree-holder under sec. 315 C. P. Code, 1882 (O. 21, r. 93 of the Code of 1908) to recover purchase-money on the ground that the judgment debtor had no saleable interest in the property sold is governed by Article 62, and not by this Article. Since the judgment-debtor had no title to the property that was sold as his property, there was no consideration at all for the purchase-money that was paid and the suit fell not under Article 97 but under Article 62—*Ram Kumar v. Ram Gour*, 37 Cal. 67 (70); *Rustomji v. Vinayak*, 35 Bom. 29 (34, 35). The Madras High Court was of opinion that a suit under sec. 315 C. P. Code by the auction purchaser for refund of purchase-money on the ground that the judgment-debtor had no saleable interest, was governed by Article 120, no special period of limitation being fixed for such suit by any other Article—*Nilakanta v. Imamshahib*, 16 Mad. 361 (363). In a recent case the Calcutta High Court has pointed out that the wording of O 21, r. 93 C P. Code of 1908 is different from the wording of sec 315 of the C P. Code of 1882, and that the remedy of an auction purchaser under O 21 r. 93 to recover his purchase-money on the ground that the judgment-debtor had no saleable interest is not by a *suit*, but by an *application* under Article 181 (whereas his remedy under the Code of 1882 was often by a suit or by an application)—*Makar v Sarfuddin*, 50 Cal. 115 (122).

But where upon the sale being set aside at the instance of the judgment-debtor under sec. 311 C P Code (1882) a suit is brought by the auction purchaser for recovery of a sum of money *not from the decree-holder* but from a third person who had, after the sale and the deposit of the money in Court, attached that sum in execution of his decree against the judgment-debtor, as representing the surplus sale proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder, the suit is governed by Article 120, neither Art. 62 nor Art 97 applied to the case, because those Articles contemplate a suit between the *contracting parties* to the sale which afterwards proves infructuous; but in the present case, the suit by the auction purchaser against a third party cannot be regarded as a suit between the *contracting parties* to the sale—*Amrita Lal v. Jogendra*, 40 Cal. 187 (191).

A suit by the auction-purchaser for refund of money paid for land purchased in a sale held for arrears of rent under the Madras Rent Recovery Act (VIII of 1865), which was afterwards set aside, is governed by this Article—*Appavoo v. District Board*, 17 M.L.J. 298.

A being indebted to B agreed to sell him certain property setting off the debt against the purchase-money. No money was paid, and disputes arising as to the other terms of the agreement, a litigation followed in which the agreement was held to be unenforceable. B then brought a suit against A for the debt, and A pleaded limitation. It was held that the amount claimed by B should no longer be regarded as the old debt; that the old debt had changed its character, having been the subject of an agreement by which it became the consideration for a proposed sale of land; and that the sale being declared unenforceable, the present suit must be deemed as one to recover money paid on a consideration which has failed; and that limitation ran from the date of the dismissal of the former suit (by which the contract was declared unenforceable), that being the date of the failure of consideration—*Bassu Kuar v. Dhum Singh*, 11 All 47 (P.C.) overruling *Dhum Singh v. Ganga Ram*, 8 All 214. See this case cited in Note 102 under sec. 9

438. Partial failure of consideration:—A case of partial failure of consideration does not fall under this Article. Thus, under a compromise which was incorporated in a decree of Court, the plaintiffs were to become the owners of certain parcels of property on payment of a sum of money to the defendant; they paid this money but afterwards they were dispossessed from part of the property. The plaintiffs sued to recover the money they had paid for the property in suit alleging that the existing consideration failed within the meaning of this Article. *Held* that as the plaintiffs are still in possession of part of the property dealt with by the compromise they were not entitled to bring a suit for the entire consideration; the fact that they are in possession of some of the properties transferred goes to the root of their title to recover the purchase money on the ground of failure of the existing consideration. If part of a consideration is in the hands of the plaintiffs, it is not a case of failure of consideration—*Karim Bux v. Abdul Wahid*, 27 O.C. 348, 1 O.W.N. 416, A.I.R. 1924 Oudh 377. But see the case of *Venkatarama v. Venkata*, 24 Mad. 27 cited under Note 440, in which the suit was based on a partial failure of consideration, and yet this Article was applied; but it appears that virtually there was a total failure of consideration in that case.

439. Fraud:—When fraud is alleged, the suit falls under Article 95. Thus, where a person owed money to another, and assigned to him a debt which he alleged to be due to him from a third party, and the assignee's suit against this last person was dismissed on the ground that no debt was due from him to the assignor, a subsequent suit by the assignee against the assignor for damages on the ground that the assignor had by deceitful misrepresentation induced the assignee to take the

assignment, is governed by Article 95 and not by Art. 62 or 97—*Punnayil v. Raman Nair*, 31 Mad. 230 (233).

440. Starting point of limitation :—A member of a joint family governed by the Mithila law executed a sale, and the purchaser having applied for mutation of names, the Collector rejected the application in 1880, on opposition by the other members of the vendor's family. The purchaser sued for possession but that suit was dismissed on 18th December 1882, and finally by the High Court in 1894. On 4th March 1885, the purchaser brought a suit for refund of purchase money. *Held* that under Art. 97, the suit was barred, as the consideration failed when the purchaser endeavoured to obtain possession of the property, and being opposed by the other members of the family, found himself unable to obtain possession—*Hannan v. Hanuman*, 19 Cal. 123 (126) (P.C.). In other words, time ran when the purchaser was effectually resisted in taking possession (1880) and their Lordships overruled the contention that the starting point was the date of dismissal of the prior suit for possession (18th December 1882). The Privy Council ruling was followed in *Talsiram v. Marlidhar*, 26 Bom. 750, where it was held that the time ran when the purchaser failed to obtain possession, and not from the date when the Court had decreed in a previous suit that the property did not pass by the sale. Where the vendee at first obtained possession but was subsequently evicted from the property under a decree on the ground that the vendor had no right to sell the property, *held* in a suit against the vendor for recovery of the purchase money, that time ran from the date of the decree in the prior suit under which the plaintiff was evicted—*Venkata Narasimhulu v. Peranna*, 18 Mad. 173. *Subbaraya v. Paragopala*, 38 Mad. 887. Where the purchasers, being disturbed in their possession brought a suit for refund of the consideration money, on a covenant contained in the sale-deed whereby the vendor agreed to recoup the purchasers in the event of disturbance of possession, *held* that the cause of action arose not on the date of the decree in the prior suit which negatived the plaintiff's title, but when the plaintiffs were actually dispossessed in execution of that decree—*Ram Chindar v. Totiah Bhatta*, 25 A.L. 519 (521). Where a purchaser under a voidable sale-deed from a qualified owner is dispossessed in execution of a decree obtained by a person entitled to avoid the sale, the period of limitation for a suit by the purchaser for the return of the price runs not from the date of the decree but from the date of actual dispossession in execution of the decree—*Srikant Varma v. Ummer* 48 Mad. 40, 43 M.L.J. 721, A.I.R. 1923 Mad. 46, 70 L.C. 879; see also *Mahomed Ali v. Badharaj*, 39 M.L.J. 449 (455), 60 L.C. 235. The defendant and his son sold a certain house to the plaintiff. But the plaintiff not having been given possession, sued for possession, it was then found that the sale did not bind the son's interest in the property, and that though the plaintiff was entitled to possession of the father's share, a division ought not to be effected, on the ground of inconvenience attending the division of the house. The plaintiff was awarded the value of the defendant's share. He now sued to recover the balance of the price paid, on the ground of

failure of consideration to the extent of the son's share. *Held* that the failure of consideration must be taken to have occurred when it was found in the suit for possession that the plaintiff was not entitled to recover the son's share—*Venkatarama v. Venkatasubramanian*, 24 Mad. 27 (31).

In a suit by an auction purchaser to recover purchase-money under sec. 315, C. P. Code, 1882 (O. 21, r. 93, C. P. Code 1908), on the ground that the judgment-debtor had no title to the property sold, the cause of action arises not on the date when the Court of first instance decides that the judgment-debtor had no saleable interest in the property, but on the date on which the auction purchaser is *actually dispossessed* in pursuance of a decision of the High Court on appeal from the decree of the first Court—*Gurshidawa v. Gangawa*, 22 Bom. 783 (785). But the Madras High Court is of opinion that the starting point of limitation is the date of the decree of the first Court declaring the judgment-debtor to have no saleable interest in the property, and not the date of the decree of the appellate Court confirming the first Court's decree—*Nadukandee v. Kuttayil*, 16 L.W. 285, A.I.R. 1923 Mad 23, 70 I.C. 45. The Calcutta High Court holds that time runs from the date when the sale is set aside on the ground of defect of title of the judgment-debtor and not from the date when the plaintiff actually lost possession—*Byraj v. Raja Bijoy Singh*, 30 C.W.N. 79, 91 I.C. 768, A.I.R. 1926 Cal 297.

A purchaser of a patni under Reg. VIII of 1819 brought his suit for recovery of purchase money from the zeminder as the sale of the patni had been set aside on the suit of a darpatnidar. The Judicial Committee held that the period of limitation ran from the date of the decree of the Court of first instance setting aside the sale, and not from the date of the appellate decree affirming the first Court's decree, nor from the date when the purchaser lost possession—*Juscurn v. Prithichand*, 46 Cal. 670 (P.C.), 46 I.A. 52, 23 C.W.N. 721, A.I.R. 1918 P.C. 151.

Moneys were advanced on a mortgage executed on behalf of a minor, and interest paid for some time. A mortgage-decree was subsequently obtained and the property sold. Afterwards in a suit by the minor the mortgage was declared void and the sale set aside. A suit was then brought to recover the amount of the loan from the parties who acted for the minor. *Held* that Article 97 applied; there was no total failure of consideration *ab initio*, because the mortgagees had obtained interest for some time. The consideration failed on the date on which the decree was passed setting aside the mortgage and the period of limitation ran from that date—*Ma Hnit v. Fatima*, 5 Rang. 283 (P.C.), 54 I.A. 145, 31 C.W.N. 830, 101 I.C. 414, A.I.R. 1927 P.C. 99, 29 Bom. L.R. 863, 52 M.L.J. 579, 25 A.L.J. 918.

Where in a suit for specific performance of a contract to sell or for refund of the earnest money in the alternative, the Court finds the contract to be unenforceable, a decree would be passed for refund of the money and the consideration must be deemed to have failed from the date of the judgment pronouncing the contract to be unenforceable, and

the claim for refund is not therefore barred by limitation—*Anna Bibi v. Udit Narain*, 31 All. 68, (P.C.), 36 I.A. 44, 1 I.C. 690, 9 C.L.J. 512, (affirming *Udit Narain v. Minnatullah*, 25 All. 618). Similarly, where a suit for specific performance of a contract for sale of a certain property is dismissed, and the plaintiff afterwards brings a suit for recovery of the earnest money he had paid in pursuance of the contract for sale, the period of limitation for this suit begins to run from the date of the judgment dismissing the plaintiff's previous suit for specific performance—*Munni Babu v. Kunwar Kamta Singh*, 45 All. 378 (379), 21 A.L.J. 265, 72 I.C. 86, A.I.R. 1923 All. 321; *Maung Kyi v. Maung Kyaw*, 4 Bur.L.J. 197, 93 I.C. 119, A.I.R. 1926 Rang. 7.

A Hindu widow sold some property to S in 1888, and in 1897 the reversioners instituted a suit for declaration that the sale by the widow should not affect their reversionary rights, and this suit was eventually decreed by the Privy Council in 1909. In the meantime, S had sold the property to the plaintiffs in 1898. After the death of the widow in 1919, the reversioners brought a suit for possession of the property, which was decreed in 1921, and the plaintiffs had to give up possession. They then instituted a suit in 1921 for recovery of the purchase-money. Held that time ran when the plaintiffs were actually dispossessed in 1921 for it was then that the consideration failed, and not from the date of the Privy Council decision in 1909, for that decision had not negated the vendees' title but only declared the alienation to be voidable after the death of the widow—*Gopal Dai v. Dhanna*, 9 Lah. 191, 106 I.C. 804, 29 P.L.R. 208, A.I.R. 1927 Lah. 570 (572). In September 1908, defendant No. 1 contracted with the plaintiff for a price to procure from defendant No. 2 a reconveyance of certain property to the plaintiff. The property at that time was already in the plaintiff's possession. In November 1908, the defendant No. 2 conveyed his property to V, who sued to recover its possession from the plaintiff, and obtained a decree in July 1911. In January 1912 the plaintiff sued to recover the consideration money from the defendant No. 1. It was held that the suit was time-barred, the cause of action arising in November 1908, the moment there was a conveyance to V; although the plaintiff retained possession till 1911, that possession was merely on sufferance and by the grace of V—*Gulab Chand v. Narayan*, 41 Bom. 31, 36 I.C. 613.

A, a purchaser from a junior member of his share in joint family properties, attempted to take possession thereof, but was resisted by a prior purchaser of those properties from the manager of the family. A then instituted a suit for the recovery of the share purchased by him and the litigation was carried up to the High Court whose decision was against him. Within three years of the date of the judgment of the High Court but more than three years after the date on which he was resisted, A instituted a suit for the recovery of the sale-price and of the costs incurred in the unsuccessful litigation. Held, that the suit was not barred by limitation as the consideration for the sale failed on the date of the High Court's decision, and the cause of action for the suit arose only on that date—*Sarvothama v. Chinnasami*, 42 Mad. 507.

Where a lessee was evicted by a person claiming a title superior to the lessor, the cause of action for a suit by the lessee against the lessor to recover the amount of premium paid for the lease arose not from the date when the successful claimant obtained a decree against him for possession but from the date when he was *actually evicted* in execution of that decree—*Sukmoy v. Shashi*, 10 I.C. 486 (Cal.) In a suit for refund of money paid under a contract of lease which subsequently becomes void, time runs when the contract becomes void—*Anant v. Sarup*, 26 A.L.J. 492, A.I.R. 1928 All. 360 (363).

98.—To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust. Three years. The date of the trustee's death, or if the loss has not then resulted, the date of the loss.

441. The suit contemplated by this Article is a suit not for recovery of the trust property, but for *compensation* for the loss

The distinction between sec. 10 and Article 98 is that, if the loss occasioned by a breach of trust is the loss of trust-moneys, and such moneys may be followed in the hands of the legal representatives of the deceased trustee, sec. 10 will apply—*Chintaman v. Khanderao*, 52 Bom. 184, 30 Bom. L.R. 45, A.I.R. 1928 Bom. 58; but if such moneys have to be recovered from the general estate of the deceased trustee, Art. 98 will apply.

In an earlier Bombay case Scott J. has remarked that the "loss" in this Article means the loss of the specific property mentioned in sec. 10. If the specific property is irrecoverable, then its value can be recovered out of the general estate of the deceased trustee within 3 years under this Article—*New Fleming S. & W. Co. v. Kessowji*, 9 Bom 373 (400). But U. N. Mitra is of opinion that "this Article applies to any loss, (whether of the *specific* property or not) occasioned by any breach of trust, whether fraudulent or not"—U. N. Mitra's Limitation, 5th Edn., p. 1014

General estate :—The joint family property of the father and sons, which passes by survivorship to the sons on the death of the father, does not form the 'general estate' of the deceased trustee (father)—*Subramania v. Gopala*, 33 Mad. 308.

99.—For contribution by a party who has paid the whole or more than his share of the amount due under a join decree, or by a sharer in a Three years. The date of the payment in excess of the plaintiff's own share.

joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-sharers.

442. The words "the whole amount" in the Act of 1877 have been changed into "the whole or more than his share of the amount" in the Act of 1908. Under the old Act, this Article did not apply to a case where not the whole, but only a part, of the money due under a joint decree was realised from the plaintiff, and therefore where a decree holder having a joint decree against the plaintiff and the defendant brought to sale the property of the plaintiff and received out of the sale-proceeds a part of the decretal amount this Article did not apply to a suit for contribution brought by the plaintiff against the defendant and it was doubtful whether Art 61 or 120 applied—*Pattabhiramayya v Ramayya*, 20 Mad. 23. In *Ibn Hasan v Brijbhukhan*, 26 All 407, also Stanley C. J. doubted whether this Article applied to a case where only a part of the money was realised from the plaintiff. But this doubt has been removed by the change introduced into the present Article; and a suit such as one mentioned above would now fall under it.

443. Payment whether creates a charge—In *Khub Lal v Pudmanand*, 15 Cal 542, it has been held that where a co-sharer of a revenue-paying estate pays the whole amount of the arrears of revenue in order to save the estate from sale, he does not thereby acquire any charge upon the shares of the other co-shares, but is only entitled to contribution; consequently his suit falls under Article 99 and not under Article 132. The same view is taken in *Bhubheshwari v Manir*, 7 Pat 613, 9 P.L.T. 573, A.L.R. 1928 Pat 641 (610), 111 I.C. 84, *Upendra v Girindra*, 25 Cal 565 (560), *Kinoo Ram v Muzaffar*, 14 Cal 809 (F.B.) (overruling *Enayet Hussain v Muddunmoonee*, 14 B.L.R. 155), *Kristo Mohini v. Kali Prosanna*, 8 Cal 402 (410); *Shirao v Pandlick* 26 Bom 437 (439) (dissenting from 11 Bom 313). This view is based on the following observations of Cotton L. J. in *Falcke v Scottish Imperial Assurance Co.*, (1886) 34 Ch D 234 (at p 241). "A man by making a payment in respect of property belonging to another, if he does so without request, is not entitled to any lien or charge on that property for such payment." In the same case Bowen L. J. observed "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited." In another English case also it has been held that the right to contribution is a personal right, and this remedy is a *persona tenetis*, and there is no lien in respect of which the contribution arises. *Per 155.* J in *Leslie v. French*, (1883) 23 Ch D. 552 (564).

But a contrary view has been taken in *Seshagiri v. Pichu*, 11 Mad. 452; *Rajah of Vizianagram v. Rajah Setrucherla*, 26 Mad. 686 (715) (F.B.), *Alayakammal v. Subbarayya*, 28 Mad. 493 (494); in these cases a payment of revenue by one of the co-sharers has been held to create a charge in his favour so as to entitle him to take advantage of Article 132. The same remark has been made (by way of obiter) in *Achut v. Hari*, 11 Bom 313 (318).

"The way in which the two lines of decisions may be reconciled is, that if a money decree is sought, then three years is the period of limitation, but if the over-payment is a charge on the land and it is sought to recover it out of the land, then the case falls under Article 132"—Starling, 5th Edn, pp. 298-299. Where only a personal decree is sought, and the suit is not intended to enforce any charge, it would come under Art. 99, or if for some reason or other this Article is not applicable, Art. 61 would apply. But it would not fall under Art 120, which is a most general Article—*Raja of Vizianagram v. Rajah Setrucherla*, 26 Mad. 686 (F.B.). If the payment of revenue is made by a person other than a co-sharer (e.g. by a lessee), he acquires a charge—*Ram Dutt v. Horakh*, 6 Cal. 549. (This ruling has been doubted in 8 Cal 402 and dissented from in 14 Cal. 809 F.B.).

444. Voluntary and involuntary payment :—In cases in which the right to contribution exists under the law, it is immaterial whether the party seeking contribution paid the money voluntarily or involuntarily, i.e., whether he made the payment of his own will and thus averted a coercive process against his property, or whether the amount was realised by seizure and sale of his property—*Raja of Vizianagram v. Raja Setrucherla*, 26 Mad 686 (693) (F.B.). In an earlier case the Calcutta High Court was of opinion that money realised by the sale of plaintiff's property was not money paid within the meaning of Arts. 61 and 99—*Janki v. Domi*, 18 C.W.N 480, 20 I.C. 24. But in a recent case it has adopted the more liberal view and laid down that it does not matter whether the money in respect of which the right of contribution arises was actually handed over by the party seeking contribution or was realised from him by coercive process by the creditor, as for instance, by execution of a decree. In either case the right of contribution arises from the fact that one of the co-debtors has paid in excess of his share and the joint liability of all of them has been discharged—*Goli Nath v. Chandra Nath*, 26 C.W.N. 340, 57 I.C. 884, A I R. 1921 Cal. 814.

It seems that the words "or more than his share" would imply involuntary payments. A person who would voluntarily pay would pay the whole and not anything less.

445. Starting point of limitation :—Where the plaintiff, a joint judgment-debtor, deposited the entire decretal amount in Court, and the Court accepted the money on behalf of the decreeholder in full satisfaction of the decree, but the decreeholder withdrew the money on a later date, held in a suit for contribution by the plaintiff, that the deposit of the decretal amount in Court was 'payment' within the meaning

of the 3rd column of this Article, and time ran from the date of deposit and not from the date when the decreeholder withdrew the money from Court. The criterion in each case must be whether the deposit made by the plaintiff in excess of his share did or did not remain under his control—*Gahar Ali v. Abdul*, 56 Cal. 192, 32 C.W.N. 1030 (1034, 1035), A I R. 1928 Cal. 361, 49 C.L.J. 5. In an earlier Calcutta case, where a joint judgment-debtor in an execution case made an application to the Court stating that a certain sum was in deposit in his account in another Court and praying that the execution Court should send for so much of the amount as would be necessary to satisfy the decree, and the money was received by the executing Court on 1st April 1873 and paid on the same day to the decreeholder, held in a suit for contribution by the joint judgment-debtor, that time ran not when the money was offered or ordered to be paid, but when it was actually paid over to the decreeholder—*Radha Kristo v. Rup Chunder*, 3 C.L.R. 480. In this case the money was received by the executing Court and paid over to the decreeholder on the same day, and so there is no conflict with the ruling in 32 C.W.N. 1030 above. Where the payment is involuntary (i.e. where money is realised by attachment and sale) limitation runs from the time the judgment-creditor drew the money out of Court, and not from the date when the money was realised by execution sale—*Fuckoruddeen v. Mohlma*, 4 Cal. 529. Cf. *Pattabhiramayya v. Ramayya*, 20 Mad. 23.

446. Suits under this Article.—Where by an agreement of partnership every partner was at liberty to borrow money on his own credit and to pay the money into the firm for carrying on the business, and where a partner borrowed money on his individual credit for the benefit of the business, and afterwards the money was realised from him under a decree by the creditor, a suit by the partner for contribution against the other partners was maintainable, and would be governed by this Article—*Durga Prosonna v. Raghunath*, 26 Cal. 254 (257).

A mortgagee was directed to pay off a prior mortgage out of the consideration for his own mortgage. Default having been made in payment, the prior mortgagee sued both the mortgagor and the subsequent mortgagee and obtained a joint decree. The mortgagor paid off the decree and sued to recover the amount from the subsequent mortgagee. Held that the suit was governed by Article 99, and not by Article 61 or 110, and the period of limitation ran from the date when the decree was satisfied by the mortgagor—*Lakhi v. Murat Tiwari*, 22 A.L.J. 737, A I R. 1924 All. 843, 83 I.C. 875.

447. Suits not under this Article.—Where rent, not revenue, is paid by one of the co-sharers in respect of the entire holding, a suit for contribution is governed by Art. 61 (and not by this Article)—*Swarnamoyi v. Hari Das*, 6 C.W.N. 903 (904). But in *Thanikachella v. Shudachella*, 15 Mad. 258, this Article was applied to such a suit. No reason is stated and the judgment is a very short one. Probably the learned Judge overlooked the fact that the word 'revenue' and not 'rent' is used in the Article. Moreover the rent was not paid in pursuance of

are entitled to enforce—*Asiatulla v. Danis Mohamed*, 50 Cal. 253 (255, 257), 36 C.L.J. 379, 70 I.C. 169, A.I.R. 1923 Cal. 152; *Md. Mozaharal v. Md. Azimaddin*, 27 C.W.N. 210, 37 C.L.J. 108, A.I.R. 1923 Cal. 507. But see 33 All 568.

If the deed of dower be registered, Article 116 would apply—*Asiatulla v. Danis*, (supra); *Md. Mozaharal v. Md. Azimaddin*, (supra).

Where a Muhammadan husband executed a registered deed long after marriage, promising to pay the dowry then still due from him, on demand, and hypothecating certain immoveable properties as security for its due payment, held that the bond converted the dower-debt into a mortgage-debt, and Article 103 was inapplicable. If the suit for recovery of the dowry prays for a simple money-decree and not a decree for sale, the six years' rule of limitation under Article 116 would apply, time running from the date of execution of the deed—*Kubra Begum v. Fazal Husain*, A.I.R. 1927 All 268, 99 I.C. 553

103.—By a Muham- Three When the marriage is
madan for deferred years. dissolved by death or
dower (*mu'wajjal*). divorce.

451. A suit by the heirs of the wife for deferred dower falls under this Article—*Asiatulla v. Danis Muhammad*, 50 Cal. 253 (257); *Mahomad Ishaq v. Akramal Haq*, 12 C.W.N. 84, 6 C.L.J. 558. Where a Muhammadan widow remains in possession of her husband's property in lieu of her dower, but is afterwards dispossessed by the other heirs of her husband and then dies, and a suit is brought by one of her heirs to recover his (plaintiff's) share of the dower-debt, out of the assets in the hands of the heirs of her husband, the suit is not governed by this Article—*Hamidullah v. Najo*, 33 All 568 (570), 8 A L.J. 578, 10 I.C. 282.

105.—By a mortgagor Three When the mortgagor
after the mortgage years. re-enters on the mort-
has been satisfied to gaged property.
recover surplus col-
lections received by
the mortgagee.

452. Where a mortgagee takes possession of the mortgaged property as a security for his debt, he has no right to be in possession of the estate after he has paid himself what is due to him out of the property. If he holds the property subsequent to his having been paid, the mortgagor would be entitled to possession and surplus profits together with interest thereon. The limitation applicable to a suit for recovery of such profits with interest thereon is that provided by this Article—*Abdul Hassan v. Jagwantia*, 32 I.C. 729 (Oudh).

A usufructuary mortgage contained a stipulation that the mortgagee should deduct the interest from the collections and pay over the balance annually to the mortgagors, the property being redeemable on payment of the principal money on the expiry of seven years. After redemption

of the mortgage without the intervention of the Court, a suit was brought by the mortgagor for the recovery of the balance of collections which remained in the hands of the mortgagee after deducting the interest for the years during which the collections had been made. The defendant pleaded that the suit was governed by Article 109, and that the cause of action arose each year for the profits of that year, and that the suit was time-barred. *Held* that Art. 109 did not apply because it could not be said that the profits were *wrongfully* received by the defendants, when the deed expressly gave them power to realise the profits, though they were no doubt required to pay over the profits to the plaintiff. The suit fell under the purview of Article 105 and having been brought within three years from the date of restoration to possession, was within time. The use of the word 'annually' in the deed did make the cause of action accrue year by year, the ordinary principle regulating the rights of the mortgagee is that when he is in possession of the property he must account to the mortgagor for all sums realised in excess of the amount to which he was entitled, and it is at the time of redemption that accounts are made up and settled between the parties—*Bikhramjit v. Raj Raghubar*, 20 O C 25, 38 I.C. 610.

Art 105 should not be so construed as to conflict with the provisions of sec. 43 C. P. Code 1882 (O 2, r. 2, C.P.C. 1908) and must be deemed to refer to cases where the mortgagor has got possession of the mortgaged property *otherwise than by a suit for redemption*, for where a mortgagor brings a suit for redemption, he is bound to claim an account for any surplus received by the mortgagee after discharge of the mortgage-debt and if he omits to make such claim in that suit, he cannot maintain a second suit for recovery of the surplus collections, sec. 43 C. P. Code being a bar to such a suit—*Ramdin v. Bhup*, 30 All 225 (228, 230). The ruling in 30 All 225 has been followed by the Calcutta High Court in *Prasanna v. Nilambar*, 26 C W N 123, A I R 1922 Cal 189, 64 I.C. 75. The Bombay High Court likewise holds that redemption suit has for its purpose the complete adjustment of the rights of the parties, and therefore if a mortgagee at first brings a suit for redemption but in that suit does not claim to recover the surplus profits, a subsequent suit for recovery of the surplus collections is barred by *res judicata*, because the claim is one which ought to have been decided in the suit for redemption—*Vinayak v. Dattatraya*, 26 Bom 661 (668). See also *Zakiuddin v. Chunnilal*, 103 I.C. 290, A I R 1927 Nag 302.

But where the mortgagor brings a suit for redemption without claiming for the surplus collections and gets a decree, he can afterwards bring a suit contemplated by this Article, by *permission of the Court* obtained under section 43, C. P. C. 1882 (O II, r 2 C P Code 1908). Although, when a redemption suit is brought, the claim for surplus collections should be made along with the claim for redemption, *still if permission be obtained* under sec 43 C. P. Code to bring a subsequent suit for the recovery of the surplus collections, there is no conflict between the provisions of this Article and those of sec. 43 C. P. Code—*Muhammad*

Fayaz v. Kallu Singh, 33 All. 244, (247), 8 I.C. 689, 7 A.L.J. 1201 (distinguishing *Ram din v. Bhup Singh*, 30 All. 225). The Nagpur Court, however, is of opinion that* if the Court orders the suit for surplus collections to be tried separately from the redemption suit, such order does not alter the nature of the suit for surplus profits, and the suit is governed by Article 148 and not by Article 105—*Zakiuddin v. Chunnilal*, (supra).

Where in a suit for redemption of a usufructuary mortgage, the mortgagor alleges that if accounts were taken, a large sum would be found due from the mortgagee, and the mortgagor accordingly prays that an account may be taken and a decree may be passed for the amount which may be found due to him after adjustment of accounts, held that since the claim for recovery of the surplus profits received by the mortgagee is a relief which is a part of the suit for redemption itself, Article 105 does not apply, and if the suit for redemption is brought within the period of limitation prescribed by Article 148, the claim for surplus profits is not barred—*Prasanna v. Nilambar*, 26 C.W.N. 123, 64 I.C. 75, A.I.R. 1922 Cal. 189.

A suit by a mortgagor against a mortgagee, brought after redemption of the mortgage, for compensation for loss caused by the latter having cut down trees standing on the mortgaged property during the subsistence of his possession, is governed by this Article and not by Article 109, and the period of limitation runs from the time when the mortgagor re-enters on the property—*Ram Sukh v. Indur Kunwar*, 6 O.L.J. 53, 50 I.C. 152.

A subsequent suit for recovery of surplus profits is maintainable where the profits have been received by the mortgagee after the mortgagor has deposited the redemption money in Court. But such a suit is not a suit for surplus collections received by the 'mortgagee' because the collections were made by a person who had ceased to be a mortgagee—*Sahari Dutta v. Sheikh Ainuddy*, 14 C.W.N. 1001 (1005), 6 I.C. 336, 12 C.L.J. 620.

106.—For an account Three The date of the dissolution and a share of the years. profits of a dissolved partnership.

453. Dissolved partnership :—This Article applies to suits brought after the dissolution of partnership. So long as a partnership business is subsisting, a suit for share and accounts is not maintainable, though a suit for partnership-accounts only may be allowed under exceptional circumstances, where equity requires such a course—*Kassa v. Gopi*, 9 All. 120 (121); and to such a suit Art. 120, and not Art. 106, applies—*Gokul v. Sasimukhi*, 16 C.W.N. 299, 15 C.L.J. 204, 13 I.C. 23.

This Article applies only in the case of a partnership that has already been dissolved. A suit which is in terms one for dissolution of a continuing partnership, and stated in the plaint to be so, is governed by Art. 120, and not by this Article, even though the parties treated the suit as one for accounts of a dissolved partnership—*Narayanaswami v. Gangadhara*.

37 M.L.J. 353, 48 I.C. 89; *Khorasany v Acha*, 6 Rang. 198, A.I.R. 1928 Rang. 160 (162), 110 I.C. 349; *Haramohan v Sudarshan*, 25 C.W.N. 847, A.I.R. 1921 Cal 538, 66 I.C. 811. A suit for a declaration that a partnership existed between certain persons, praying that if the partnership still existed it might be dissolved, and that if it had been dissolved the date of the dissolution may be fixed, and that in either case a liquidator may be appointed to take an account, and, after realising assets and discharging obligation, to pay to the plaintiff his share of the balance, is a suit for dissolution of partnership governed by Art. 120, and not by this Article—*Harrison v. Delhi and London Bank*, 4 All. 437 (451). A suit for division of immoveable property which formed part of the partnership assets, after the dissolution of partnership, is governed by this Article—*Gobardhan v. Ganeshi*, 11 I.C. 288 (All.).

A suit was brought in 1900 for account and share in a property acquired by the plaintiff and the defendant as undivided brothers in a contract business carried on by them by an implied agreement of partnership till 1894, and then continued by the defendant alone till the date of suit. Held that the suit fell under this Article and being brought more than three years after the agreement came to an end in 1894, was barred—*Sudarsanam v. Narasimhulu*, 25 Mad 149. Where the manager of a joint Hindu family enters into a partnership for the family benefit with a person who is a stranger to the family, the partnership is dissolved on the death of the manager, in the absence of any agreement with the surviving members of the family, and the fact that some of the goods which were purchased during the subsistence of the partnership were sold after the dissolution, with the consent of one of the surviving members of the family, is not an indication that the partnership continued. The goods had to be sold and converted into cash after the dissolution as there was no necessity of keeping them; they merely represented the assets of the partnership—*Rambhau v. Prayag Das*, 20 N.L.R. 49, 78 I.C. 198, A.I.R. 1924 Nag 263; *Sokkandha v. Sokkandha*, 28 Mad. 344.

Where, after a partnership has been dissolved by death of one partner, the surviving partners continue to carry on the business, as if no such dissolution has taken place, the statute of limitation is no bar to the taking of accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement, and consequently a suit for an account and a share of the profits (of the old as well as the new partnership) brought within three years of the dissolution of the new partnership is in time, and is not barred by this Article by reason of the lapse of more than three years from the date of dissolution of the old partnership—*Maharaj Kishen v Hargobind*, 101 P.R. 1914, 27 I.C. 69; *Ahinsa Bibi v. Abdul Kader*, 25 Mad. 26 (31); *Harchand v Jugal Kishore*, 5 Lah. L.J. 55, A.I.R. 1922 Lah. 349, 68 I.C. 722; *Abdul Jaffar v. Venu Gopal*, 46 M.L.J. 503, 80 I.C. 378, A.I.R. 1924 Mad. 708. It should be noted that the above rules will apply only if the suit is brought by a person who was a member of both the new and the old partnerships, or by a person who is a member of the new partnership only; if the suit is brought by

a person who was a partner of the old partnership business only and not a member of the new partnership, and the suit is brought for the accounts of the old partnership and is instituted more than three years after the dissolution of the old partnership, though within three years from the dissolution of the new, the suit is barred—*Abdul Jaffar v. Venugopal*, (supra).

This Article applies to a suit for an account and a share of the profits, that is, for an *unascertained* share of the profits of a dissolved partnership. But where after the dissolution of a partnership, accounts were taken and scrutinized between the partners, and as a result of the scrutiny the defendant admitted in writing in the plaintiff's *bahi* a debit balance of Rs 4000 due from the defendant to the plaintiff, held that a suit for the amount did not fall under Article 106 but was a suit on an account stated under Article 64—*Nand Lal v. Partap*, 3 Lah. 326, A.I.R. 1922 Lah. 425, 69 I.C. 502.

Presumption of dissolution :—Where it is proved that since the establishment of the business in 1868 down to 1891, annual accounts were regularly rendered between the contending parties, and that these accounts entirely ceased in 1891 in which year a final account was made out showing a complete division of the partnership shares, it was held that the presumption was in favour of dissolution in the year 1891—*Joopody v. Palavarti*, 36 Mad. 185 (P.C.), 25 M.L.J. 128, 17 C.W.N. 1006, 19 I.C. 513.

454. Suit by heir of a deceased partner :—When a member of the partnership dies, there is a dissolution of the firm, and a suit by the heir of the deceased partner against the surviving partners for an account and for the share of the deceased in the partnership assets, comes under this Article—*Jatti v. Banwari Lal*, 4 Lah. 350 (P.C.); *Mohit v. Rajnarain*, 9 C.W.N. 537; *Nihal Devi v. Kishore Chand*, 97 P.R. 1910, 8 I.C. 999; *Rambhau v. Prayag Das*, 20 N.L.R. 49, A.I.R. 1924 Nag. 263; *Sokkhandha v. Sokkandha*, 28 Mad. 344. Two Muhammadan brothers S and M carried on a business jointly and the property A was purchased out of the money acquired in the joint business, in the name of M. S died 18 years before this suit. On the death of S, his two sons carried on various business with M and one K and the property B was purchased out of the earnings of these businesses. K died more than three years before suit. The heirs of S now brought this suit against M for their share of the properties purchased out of the earnings of the several businesses and for their share of the monies collected therein. It was held that the suit to recover the share of the property A was barred under this Article about 15 years ago, and the claim for a share in property B was also barred, being brought more than three years after the death of K. Held also that Art. 127 did not apply because in Muhammadan Law there is no such thing as joint family property. Even if Art. 123 were to apply in respect of property A, the suit is also barred—*Mohideen v. Syed Meer Saheb*, 38 Mad. 1099, 32 I.C. 1002.

455. Suit by servant partner :—A suit by a servant remunerated by a share of the profits of the business, for an account is governed by this Article, and not by Art. 120—*Kalidas v. Draupadi*, 22 C.W.N. 104, 43 I.C. 893. The facts of this case have been fully stated in Note 215 under section 22.

456. Assets realised after dissolution :—It was held by the Bombay and Madras High Courts that where after the dissolution of a partnership, a partner realised some assets, a suit by the other partner (or his representative) for recovery of his share in those assets was governed by Art. 62, and was maintainable if brought within 3 years of the date of the realisation, though a suit for a general account in respect of the partnership business might be then barred under this Article—*Meranaji v. Rustumji*, 6 Bom. 628; *Sokhandha v. Sokhandha*, 28 Mad. 344; *Rivet-Carnac v. Gokuldas*, 20 Bom. 15. But this view has not been accepted by the Punjab Chief Court in *Nihal Devi v. Kishore Chand*, 97 P.R. 1910, 8 I.C. 999, where it has been held that if a suit relating to the general account of a partnership business is barred by Article 106, it is equally barred in respect of the assets of the business realised after dissolution. And this view of the Punjab Chief Court has been confirmed by the Privy Council in *Gopala Chetty v. Vijayaraghavachariar*, 45 Mad. 378 (P.C.), 49 I.A. 181, 43 M.L.J. 305, 26 C.W.N. 977, 24 Bom.L.R. 1197, 20 A.L.J. 862, A.I.R. 1922 P.C. 115, 74 I.C. 621 (approving 97 P.R. 1910, and disapproving of the Bombay and Madras cases cited above).

457. Registered deed of partnership :—Even though the instrument of partnership is registered, a suit for accounts and profits of a partnership would be governed by this Article and not by Article 116, because the latter Article is restricted to suit for 'compensation'—*Vairavan v. Ponnayya*, 22 Mad. 14.

458. Starting point of limitation :—In a partnership agreement it was stated that the partnership was to continue up to a certain date, but prior to that date the partnership was dissolved, it was held that limitation ran from the actual date of dissolution, and not from the date mentioned in the agreement—*Sooleman v. Bhagwandas*, 34 Bom. 515 (516). Where a partnership business began to fail in 1906, and was closed in 1909 and the only work done subsequently consisted in realising the assets, paying debts due to creditors, and recovering rents from tenants of immoveable property belonging to the partnership, the business was held to have been dissolved in 1909, and a suit for rendition of accounts, brought in 1913 was barred—*Amirchand v. Jawahur*, 49 P.W.R. 1916, 32 I.C. 853.

107.—By the manager Three The date of the pay-
of a joint estate of years. ment.
an undivided family
for contribution in
respect of a pay-

ment made by him
on account of the
estate.

459. Where money is borrowed by the manager of a joint Hindu family on his personal security for purposes of necessity, his right to contribution arises from the date when he expends the money. The period of limitation in respect of his suit for contribution runs from that date and not from the date on which he repays the loan to the person from whom he borrowed and releases his security—*Aghore Nath v. Grish Chunder*, 20 Cal 18. Where the manager borrowed money and applied it for the purposes of the family and subsequently borrowed money to pay off the former loan, and then paid off the second loan from his private funds, limitation ran from the date on which he expended the first loan for family purposes and not from the date on which he borrowed money for the second time to pay off the first loan—*Ram Krishna v. Madan Gopal*, 12 W.R. 194. Where a manager borrowed money and spent it for family purposes and then executed a fresh bond in favour of the lender for the amount originally borrowed, the period of limitation for his suit against the other members for contribution ran from the date on which he expended the money on behalf of the family, and not from the date on which he gave the fresh bond—*Sunkur v. Goury*, 5 Cal. 321.

108.—By a lessor for Three When the trees are cut
the value of trees years. down.
cut down by his
lessee contrary to
the terms of the
lease.

460. This Article applies only when a suit is brought by the landlord to recover the value of trees cut down by the tenants; it does not apply where the landlord claims by way of set-off that in taking accounts as between himself and the tenants the value of trees cut down should be debited against the tenants who claim credit for the value of improvements made by them—*Pumpalia v. Kunhamma*, 27 M.L.J. 266, 25 I.C. 794.

109.—For the profits of Three When the profits are re-
immoveable pro- years. received.
perty belonging to
the plaintiff which
have been wrong-
fully received by
the defendant.

462. "Received":—The word 'received' means 'actually received'; the liability of the defendant is for the profits which he has actually

received; consequently, if he had been out of possession for any part of time during the period of his wrongful possession, no profit can be recovered from him for that time—*Abbas v. Fassihuddin*, 24 Cal. 413. If the defendant has not received any profits at all, the plaintiff cannot claim anything by way of *mesne profits* under this Article, but can claim damages for trespass and his suit will fall under Article 39—*Ramasami v. Authi Lakshmi Ammal*, 34 Mad. 502. In 24 Cal. 413 the Judge made a passing observation that the plaintiff can claim *mesne profits* to the extent of what the defendant might have received with ordinary diligence during the period of his possession. This observation was unnecessary for the decision of the case. But it is true in one sense *viz* that the amount of damages will be measured by the amount of profits which the defendant might with due diligence have received [See section 2 (12) of C. P. Code, 1908]. But the claim is still one for *damages* and not for *mesne profits*. See 34 Mad. 502 at p. 504.

The plaintiff is entitled to recover the profits which have been received by the defendant during three years previous to suit. Thus, if the defendant had been in possession from 18th May 1900 to 11th September 1901, and the suit is instituted on the 6th April 1904, the plaintiff will be entitled to recover the profits received by the defendant from 6th April 1901 to 11th September 1901; the claim for profits received by the defendant from 18th May 1900 to 5th April 1901 will be barred—*Peary Mohan v. Khelaram*, 35 Cal. 996; *Hays v. Padmanand*, 32 Cal. 118; *Kishnanand v. Partab*, 10 Cal. 785 (P.C.)

The plaintiff is entitled to recover the rents and profits actually received by the defendant during the three years before suit without reference to the time when the rents fall due. It is the actual receipt of rents, whenever they may have fallen due, which creates the liability—*Abbas v. Fassihuddin*, 24 Cal. 413. Thus, in a suit instituted by the plaintiff on the 1st day of 1301 B. S. he would be entitled to claim the *mesne profits* actually received by the defendant during the years 1298—1300 B. S. The fact that the rent for the year 1297 would fall due on the 1st day of 1298 would not entitle the plaintiff to claim it, unless it was actually received by the defendant during 1298-1300 B. S.

463. "Wrongfully" :—This Article is applicable only to cases where the profits have been *wrongfully* received by the defendant, but so long as the defendant remains in possession by virtue of a decree of the Court, the receipt of profits during that period cannot be said to be *wrongful*, even though the decree is afterwards set aside; therefore a suit for profits received by the defendant during that period is governed not by this Article but by Art. 120—*Holloway v. Ghuneshwar*, 3 C.L.J. 182. A suit by a mortgagor, after the mortgage has been satisfied, to recover the surplus collections realised by the mortgagee in possession, is not a suit governed by this Article, because it cannot be said that the mortgagee has *wrongfully* received those profits. The suit falls under Article 105 which expressly provides for such a case—*Bikramjit v. Raj Raghobar*, 20 O.C. 25, 38 I.C. 610; *Id. Faiyaz Ali v. Kalla Singh*, 33 All. 244 (248).

The receipts of rents and profits by one of several tenants-in-common on behalf of all cannot be said to be wrongful. It is one of the ordinary modes of common enjoyment of property—*Yerukola v. Yerukola*, 45 Mad. 648 (667) (F.B.), 42 M.L.J. 507, A.I.R. 1922 Mad. 150.

A wrongful receipt is a receipt by the defendant of profits to which he has no legal title at the time of receipt, or only a title which by a subsequent decree is declared not to be a legal one; but there is no necessity that there should have been any *mala fides* in the receipt by the defendant—*Bynath Pershad v. Budhoo Singh*, 10 W.R. 486.

A suit was instituted by the owner of a *patni* for recovery of mesne profits against the defendant who had purchased the *patni* at a sale under Reg. VII of 1819 and had been in possession under the purchase which was subsequently set aside. It was held that the defendant wrongfully received the profits which were receivable by the plaintiff but for the illegal *patni* sale, and that Article 109 governed the case and not Art. 120—*Peary Mohan v. Khelaram*, 35 Cal. 996 (998), 13 C.W.N. 15. Crops raised by the tenant and standing on the tenure at the time of his ejectment belong to the tenant and not to the landlord; if the landlord after ejecting the tenant cuts and carries them away, his act is *wrongful*, and a suit by the tenant, after the decree of ejectment is reversed and he recovers possession, for the value of the crops, falls under this Article—*Shurnomoyee v. Pattarri*, 4 Cal. 625 (627, 628).

Subsequently to a mortgage-decree obtained by the mortgagee, the mortgagor granted a usufructuary mortgage in favour of one A. A entered into possession of the property under it, and realised rents from certain tenants of the property. The plaintiff purchased the property at a sale in execution of the mortgage-decree mentioned above, and after obtaining possession of the property through the Court from A, brought a suit against him for recovery of the rents and profits realised by him from the tenants of the property. Held that as the usufructuary mortgage in favour of A was *pendente lite*, it was invalid against the plaintiff, and the rents were wrongfully collected by A. The suit was therefore governed by this Article. The period of limitation would run from the date when the profits were received—*Nagendra v. Sarat Kamini*, 26 C.W.N. 386. 66 I.C. 873, A.I.R. 1922 Cal. 235; *Sarat Kamini v. Nagendra*, 29 C.W.N. 973, 89 I.C. 1000, A.I.R. 1926 Cal. 65. In the latter case it was contended by the plaintiff that the period during which an application by the judgment-debtor to set aside the execution sale was pending should be excluded, as the application prevented the period of limitation from starting, and the plaintiff had only an inchoate right until the application was rejected and the sale confirmed. This contention was overruled by Walmsley, J. on the ground that the plaintiff might have instituted the suit during that period, and although he could not have obtained a decree without the sale certificate, the absence of the sale-certificate would not have been a reason for dismissing his suit. M. N. Mukerji, J. also held that the starting point of limitation in the Articles of the Limitation Act does not always synchronise with the cause of action, that under Article

109 the starting point of limitation is the time when the profits are received and not when the cause of action accrues to the plaintiff. See this case and other similar cases cited in Note 100A under sec. 9.

Certain mortgagees brought a suit for sale against the original mortgagor and against one S, an ostensible transferee of the property. S stated that not she but her sons were the real owners and they ought to be impleaded. This was not done, and the mortgagees having obtained a decree against S, put to sale her right, title and interest and themselves purchased it, and obtained possession in 1900. Thereupon the sons of S (plaintiffs) instituted a suit in 1911 to recover possession. The case came up in appeal to the High Court, and this Court held in 1920 that the plaintiffs were entitled to a decree for possession. In 1922 they instituted the present suit for recovery of mesne profits from 1911 and in answer to the defendant's plea of limitation they contended (1) that the period of limitation was suspended during the time when the previous litigation was pending, and (2) that fresh cause of action arose after the passing of the High Court's decree. *Held* that the suit was barred. The period of limitation ran from the date when the profits were received, and was not suspended, sec. 9 being imperative on this point. As regards the contention that the decision of the High Court in the previous case gave a fresh cause of action, *held* that to allow such contention to prevail would be to permit a suit for mesne profits for any number of years, even exceeding 12 years, to be instituted subsequently if the title to the property is the subject of a protracted litigation. In such cases the practice is for the plaintiff to institute a suit for mesne profits before the time expires, and to let it be stayed pending the disposal of the former litigation—*Ram Charan v. Goga*, 49 All 565, 25 A L J. 425, 102 I C. 96, A.I.R. 1927 All. 446

464. Suit by usufructuary mortgagee.—Where under a mortgage the mortgagee is entitled to enter into possession of the mortgaged property and to receive the rents and profits, the appropriate suit by a mortgagee who has been wrongfully dispossessed by the mortgagor is a suit for possession and mesne profits, the suit for possession is governed by Art. 142, and the latter remedy by this Article because the property 'belong' to the mortgagee for the period of mortgage—*Ram Sarup v. Harpal*, 39 All 200, *Govindrao v. Jiwarsi*, 2 Bom L R. 201. In 39 All. 200, Walsh J. however held that the claim for mesne profits could be justified as money had and received under Article 62. But in another Allahabad case, where a usufructuary mortgagee, who never obtained possession of the mortgaged property, brought a suit for possession within six years from the date on which he ought to have obtained possession, and in that suit claimed profits for the entire period of six years, it was held that the mortgagee was entitled to the profits for six years, as the mortgagor's failure to give possession was a breach of registered contract under Art. 116 and that Article 109 did not apply—*Nirbhai Sinha v. Talsi*, 31 I C. 894 (All).

110.—For arrears of Three When the arrears be- rent. years. come due.

465. Rent:—This Article applies only to a suit for rent, i.e. money payable by a tenant to a landlord under a contract (express or implied) between them. It does not apply to a suit for compensation against the defendant for use and occupation of the plaintiff's premises, where the relationship of landlord and tenant does not exist between the parties. Such a suit is governed by Article 120—*Madar v. Kader Mohideen*, 39 Mad. 54; *Robert Watson v. Ram Chand*, 23 Cal. 799. A suit by an inamdar for arrears of 'assessment' against a person who was not let into possession of the holding under any agreement of tenancy but who held lands in the village is a suit for land revenue and not a suit for arrears of 'rent', (because the relation between the plaintiff and the defendant is not that of landlord and tenant, but that of superior holder and inferior holder) and is not governed by this Article but by Art. 120—*Sadashiv v. Ram Krishna*, 25 Bom. 556 (558). This Article does not apply where the Government has assigned a right to receive assessment and the assignee sues for it—*Kasturi v. Anantaram*, 26 Mad. 730.

Where rent is assigned by the landlord to third party, it does not lose its character as such, and a suit by the assignee to recover rent falls under this Article—*Siris Chandra v. Nasim Quazi*, 27 Cal. 827 (F.B.), 4 C.W.N. 357; *Sheikh Munsar v. Loke Nath*, 4 C.W.N. 10; *Gajadhar v. Thakur Prasad*, 1 P.L.J. 506, 38 I.C. 102.

A suit to recover *merais* or customary dues to a *Chatram* claimed by the plaintiff not as 'rent' due to landlord but as money recoverable by custom, does not fall under this Article but under Art. 120—*Venkata-raghava v. District Board*, 16 Mad. 305.

Arrears of cess are recoverable as arrears of rent (sec. 47, Bengal Cess Act, IX of 1880); and the limitation of this Article applies—*Bhuneshwari v. Gopal*, 8 Pat. 358, A.I.R. 1929 Pat. 331 (332), 118 I.C. 733. Road cess payable to the landlord by the tenant is regarded as 'rent'—*Nabin v. Bansinath*, 21 Cal. 722. Where *dak-cess* is claimed under the contract by which rent is payable, it must be regarded as part of the rent—*Watson v. Sree Kristo*, 21 Cal. 132. *Chaukidary tax* is rent, when such tax is legally recoverable—*Assanulla v. Tirthabasini*, 22 Cal. 690.

A suit by the Zamindar to recover *jodi* and road-cess from the defendant who held the land on service inam under him subject to payment of *jodi* as well, is a suit under this Article, as *jodi* is favourable rent—*Sambasadasiva v. Maddulappa*, 74 I.C. 969, A.I.R. 1924 Mad. 73, 1923 M.W.N. 524.

466. When the arrears become due:—When a lease provides that the rent should be paid in four instalments on four specific days in the year, the period of limitation begins to run from the date on which each instalment falls due, and not from the last day of the agricultural year—*Gajadhar v. Thakur Prasad*, 1 P.L.J. 506, 38 I.C. 102.

es due not always necessarily on the close of the which it is to be paid. It may be due on a different legislation or custom or express contract or the special case. Thus, if before the institution of a suit for for the landlord to take proceeding under the Madras VIII of 1865) to enforce acceptance of the *patta* and rate of rent ascertained, the period of limitation in rent runs from the date of final decree determining in the close of the year for which the rent is payable, be said to be 'due' under this Article until the rate retained by the decree of the Civil Court. The word *rent*—*Rangayya v. Bobba Sriramulu*, 27 Mad 143 and *Ghulam v. Shunmugam*, 34 Mad 438 (441). Prior ruling in 27 Mad. 143, it was held in some Madras of action accrues on the date on which the rent is contract, irrespective of whether a *patta* has been enforce acceptance of *patta* under the Madras Rent Act—*Kumarasami v. President, District Board of Madras* (249); *Rangayya v. Venkata*, 22 Mad. 249 (Note); *K. S. v. K. S.*, 19 Mad. 21. These cases are now overruled by the present case.

cited above, the Privy Council have pointed out that an express contract or the special circumstances of any case become due at a point of time different from the close of the year of which it is to be paid, and that in India, by custom, agricultural rents are often payable before the close of the year. Thus, where according to custom, the melveram is paid after the harvest is gathered when the share of the landlord is from the tenants' share, that is, where the rent is payable on some date before the close of the fasli year, the period does not run from the close of the fasli year, but from the date ascertained as soon as the harvest is reaped. Nor does the limitation in such a case run from the tender of the rent, where there is no dispute as to the amount of rent payable and the tender of the *patta* is not necessary for the ascertainment of the condition precedent to the institution of the suit for recovery of the rent. Under the Rent Recovery Act—*Arunachellam v. Kadir* (1905), (557) distinguishing *Rangayya v. Bobba Sriramulu*,

tendering a *patta* which was necessary before the institution of the suit under the Madras Rent Recovery Act 1865, has now been overruled by the Madras Estates Land Act (I of 1908). Under

this Act, the landlord is entitled to maintain a suit for rent without tendering a *patta*. The limitation for a suit for rent is three years from the time when it accrues due, and it accrues due when it is payable according to the contract between the parties or according to usage—*Satrucherry Veerabhadra v. Ganta Kumari*, 22 M.L.J. 451, 15 I.C. 393; *Kanthimathi v. Muthusami*, 37 Mad 540 (543).

Where it is necessary that the amount of rent should be fixed by the Deputy Commissioner under sec. 65 (4) (d) of the C. P. Land Revenue Act, no arrears of rent become due until the amount has been finally determined by proper proceedings between the parties. Limitation runs from the date on which the rent is thus finally determined and not from the close of the year for which it is payable—*Raghunath v. Sarva*, 7 N L.R. 169, 12 I.C. 804.

A temple was the owner of the melvaram in certain lands, and a mutt was the owner of the kudivaram therein, liable to pay the melvaram to the temple. The defendant was both the head of the mutt and the trustee of the temple, until he was removed from the trusteeship by the Court which appointed the plaintiff as the receiver. The receiver sued to recover from the defendant as the head of the mutt the arrears of melvaram due to the temple, that had accrued during the defendant's trusteeship. The defendant pleaded limitation. Held that so long as the defendant was both head of the mutt and the trustee of the temple (*i.e.*, so long as the same person was the landlord and the tenant) there was none to sue for rent; consequently limitation did not run, and no arrears became due during that period; and the arrears became due within the meaning of this Article only when there was some one to whom they were payable *i.e.*, when a different person (the plaintiff) was appointed as the receiver of the temple—*Annamalai v. Govinda Rao*, 46 Mad. 579 (582), 44 M L J. 318, 72 I.C. 5, A.I.R. 1923 Mad. 461.

467. Registered kabuliati :—A suit to recover arrears of rent due under a registered agreement has been held by the Calcutta, Bombay, Madras and Patna High Courts to be governed by Art 116 and not by Art 110—*Umesh v. Adarmani*, 15 Cal. 221; *Ambalavana v. Vaguran*, 19 Mad. 52; *Vythilinga v. Thetchanamurti*, 3 Mad. 76; *Mackenzie v. Rameshwar*, 1 P L J 37, 34 I.C. 754; *Ramanandhan v. Achuta*, 23 I.C. 753; *Lalchand v. Narayan*, 37 Bom. 656. The Allahabad High Court held such a suit to be governed by Art. 110—*Jaggilal v. Sriram*, 34 All. 464 (465), 16 I.C. 146, *Ram Narain v. Kamta*, 26 All 138; but the Allahabad rulings must now be deemed to have been overruled by the Privy Council in *Tricomdas v. Gopinath*, 44 Cal. 759 (P.C.), 25 C L.J. 279 which has now definitely settled the question by holding that in case of a registered lease, the limitation for a suit for rent is six years under Article 116. In this case the Judicial Committee have made this important observation that if a contract is contained in a registered instrument, Art. 116 will apply, inspite of the fact that a special provision has been made in some other Article in respect of a similar instrument not registered.

A suit to recover royalty, if it is based on a registered kabuliati, would be governed by Article 116 and not by Article 110—*Tricomdas v. Gopinath Jiu*, 44 Cal. 759 (P.C.); *Peary Lal v. Madhoji*, 17 C L.J. 372, 19 I.C. 865.

468. Rent suit under Bengal Tenancy Act :—A rent suit brought under the *Bengal Tenancy Act* (VIII of 1885) is always governed by the three years' rule of limitation according to Sch. III of that Act.

whether the *kabulyat* be registered or not; the Limitation Act will not apply to such a suit—*Iswari v. Crawdy*, 17 Cal. 469; *Mackenzie v. Haji Syed*, 19 Cal. 1 (F.B.); *Kali Charan v. Harendra*, 4 C.L.J. 553.

A lease for building purposes and for establishing a coal depot or for establishing a godown, and not for agricultural or horticultural purposes, does not come under the Bengal Tenancy Act, and a suit for rent based upon such a lease, if registered, will be governed by Art. 116 of the Limitation Act—*Raniganj Coal Association v. Jadoonath*, 19 Cal 489; *Umrao v. Mahomed*, 27 Cal 205; *Ahmed v. Bipin*, 11 I.C. 6.

Where rent is assigned by the landlord to a third party, Art. 110 of the Limitation Act, and not Art. 2 Sch. III of the Bengal Tenancy Act, would govern a suit brought by the assignee for the arrears of rent—*Mahendra v. Karlash*, 4 C.W.N. 605; *Ahmedulla v. Kaminudin*, 2 I.C. 989; *Gajadhar v. Thakur Pershad*, 1 P.L.J. 506, 38 I.C. 102; *Hayat Majid v. Hazari Lal*, 63 I.C. 424 (Pat.).

<p>111.—By a vendor of Three immoveable pro years. perty for personal payment of unpaid purchase-money.</p>	<p>The time fixed for com- pleting the sale, or (where the title is ac- cepted after the time fixed for completion) the date of the accept- ance.</p>
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469. The first column of this Article in the Act of 1877 ran thus :
"By a vendor of immoveable property to enforce his lien for unpaid purchase money."

But it was held by the High Courts of Bombay, Madras and Allahabad that a suit by the vendor to enforce his lien or charge on the property for his unpaid purchase-money fell under Article 132, and not Art. 111—*Virchand v. Kumaji*, 18 Bom. 48; *Chunilal v. Bai Jethi*, 22 Bom. 846; *Har Lal v. Muhamdi*, 21 All 454; *Munirunnissa v. Akbar*, 30 All. 172; *Rama Krishna v. Subramania*, 29 Mad 305 F.B. (overruling *Natesan v. Soundra*, 21 Mad. 141, *Subramania v. Poovan*, 27 Mad. 28 and *Avuthala v. Dayamma*, 24 Mad. 233) In the light of these decisions the Article has been changed into its present form, and it is now applicable only to suits in which the vendor claims to recover the money from the vendee personally.

If the personal remedy is barred under this Article, the vendor is still entitled to enforce his charge within 12 years under Article 132—*Bashir Ahmed v. Nazir Ahmed*, 43 All 544 (545), *Meghraj v. Abdullah*, 12 A.L.J. 1034, 25 I.C. 208

Where the purchaser undertook to pay, out of the consideration-money, a debt due by the vendor to certain persons, but the purchaser not having made that payment, the vendor himself had to pay his creditors, and then he sued to recover the money from the purchaser, held that the

suit was governed by Art. 116 (the sale-deed being registered) not and by Art. 111. Art. 116 applies to all suits for recovery of money under a registered contract, although a special provision may have been made in some other Article in respect of a contract not registered—*Ram Rachhya v. Raghunath*, 8 Pat 860, A.I.R. 1930 Pat. 46 (49), 122 I.C. 244, following *Tricomdas v. Gopinath*, 44 Cal. 759 (P.C.).

112.—For a call by a Three When the call is pay-
company registered years. able.
under any Statute
or Act.

470. A suit for recovery of unpaid calls, brought, not by the company, but by the *official liquidator*, after the winding up of the company, is not governed by this Article but by Art. 120—*Parell Spinning and Weaving Company v. Maneck Haji*, 10 Bom 483; see also *Karam Chand v. Jullundur Bank Ltd.*, 29 P.L.R. 64, 9 Lah. L.J. 293, A.I.R. 1927 Lah. 543, 102 I.C. 705, where such suit was held to be governed by Article 112 or 120. If the shares of the shareholder have been *forfeited*, a suit by the official liquidator, after the winding up of the company, is governed by Article 115—*Maneklal v. Suryapur Mills Co. Ltd.*, 52 Bom. 477, A.I.R. 1928 Bom. 252 (255).

A clause in the Articles of Association of a company provided: "Any member whose shares have been forfeited shall notwithstanding be liable to pay and shall forthwith pay to the company all calls owing at the time of the forfeiture . . . and the directors may enforce the payment thereof as they think fit." The defendant, a shareholder not having paid calls, his shares were forfeited, and the company filed a suit to recover the calls according to the above clause. Held that there was a special contract whereby the defendant agreed that in the event of his shares being forfeited he would be liable to pay to the company all the moneys that were due from him for calls, and the cause of action arose when the company forfeited the shares; therefore the present suit to recover what was due from the defendant on his shares was within time, if brought within three years of the date of forfeiture, that being the date on which the calls were payable within the meaning of this Article—*Habib Rowji v. Aluminium & Brass Works Ltd.*, 49 Bom. 715, 27 Bom. L.R. 574, 88 I.C. 96, A.I.R. 1925 Bom. 321.

113.—For specific per- Three The date fixed for the
formance of a con- years. performance, or, if
tract. no such date is fixed,
when the plaintiff
has notice that per-
formance is refused.

471. **Suit based on award** :—An award is not a contract. No doubt an award springs out of an agreement to submit to arbitration (and

there may also be an implied agreement to abide by the decision of the arbitrators) but the award itself is a decision and not a contract. Therefore a suit for possession of land based on an award of arbitrators cannot be regarded as a suit for the specific performance of a contract, and Article 113 cannot apply to such a case. The suit falls under Art. 144—*Sornavalli v. Muthayya*, 23 Mad 593 (596); *Shco Narain v. Beni Madho*, 23 All. 285 (287); *Bhajahari v. Behary Lal*, 33 Cal. 881 (883, 885). Where an award declares that A is to retain possession of certain property as security for the sum of Rs. 150 and that the other co-sharers of A are entitled to recover this property on payment of the sum of Rs. 150 to A, a possessory charge is created in favour of A by the award, and a suit to enforce the charge is governed by the 12 years' rule of limitation, and not by Article 113 as the award is not a contract—*Surat Singh v. Umrao*, 20 A.L.J. 611, A.I.R. 1922 All. 410, 77 I.C. 113.

As an award is not a contract, a suit for recovery of a certain sum of money based on an award which decides the plaintiff's title to the money is not a suit for specific performance of a contract under Art. 113, but is governed by Article 120—*Kuldip v. Mahan Dube*, 34 All. 43 (48), 8 A.L.J. 1138, 11 I.C. 705 (doubting *Sukho Bibi v. Ram Sukh*, 5 All 263, and *Raghubar v. Madan*, 16 All. 3); *Radha Kishen v. Delhi Cloth Mills*, 32 P.R. 1913, 16 I.C. 804; *Rajmal v. Maruti*, 45 Bom 329 (335, 336), A.I.R. 1921 Bom. 389, 59 I.C. 755, *Sornavalli v. Muthayya*, 23 Mad. 593; *Bhajahari v. Behary*, 33 Cal. 881; *Somasundaram v. Rangasami*, 31 I.C. 816. A suit to recover damages, on the basis of the award, would not come under Article 115, nor under Article 113. The proper Article is Art. 120—*Khubchand v. Jethanand*, 23 S.L.R. 417, A.I.R. 1929 Sind 168 (169), 117 I.C. 153. A suit to recover money payable under an award cannot be properly called a suit for *specific performance* of the award (just as a suit on a bond cannot be called a suit for specific performance of the bond). Consequently Art. 113 cannot apply, but Art. 120—*Somjimal v. Tolomal*, 6 S.L.R. 148, 19 I.C. 376 (377); *Cf. Fardunji v. Jamsetji*, 28 Bom 1.

A suit to enforce an award even though it is signed by the parties, is not a suit based on a contract. The award is none the less an award and does not become a contract when signed by the parties. Consequently Article 113 or 115 does not apply to the suit, but Art. 120—*Harbhaj Mal v. Diwan Chand*, 102 P.R. 1915, 32 I.C. 88 (89). But in another Punjab case it has been remarked that if the parties sign the arbitrators' award in token of their acceptance and thus merge the award into a new contract between themselves, the claim may be regarded as one for compensation for breach of contract (Article 115)—*Radha Kishen v. Delhi Cloth Mills*, 32 P.R. 1913, 16 I.C. 804. But this remark was merely an obiter, because the parties did not sign the award in this case.

But where the award does not merely decide the right or title of the parties, but distinctly provides for *something* to be done, a suit based upon the award is virtually one to enforce specific performance of the thing to be done; and Art. 113 would apply. For instance, where the award

declared that in accordance with a compromise entered into between the parties they should transfer different portions of the disputed property to each other, a suit by one of the parties to recover the property agreed to be transferred to him, would be governed by Art. 113 and not by Art. 144—*Talewar v. Bahori*, 26 All. 497 (499). So also in *Sukho Bibi v. Ram Sukh*, 5 All. 263 and *Raghubar v. Madan*, 16 All. 3, the award directed something to be done, and Art. 113 was applied. But all these rulings have been doubted in 34 All. 43 (46-48).

472. Suits based on sale:—A suit for specific performance of a contract for the sale of immoveable property and for possession is governed by this Article and not by Art. 144, because the suit is essentially one for specific performance, and the right to possession is merely dependent on the right to specific performance—*Mohiuddin v. Majlis*, 6 All. 231.

Once there is an agreement to sell immoveable property, and the vendee has done his part of the contract by paying the purchase-money, the vendor is bound to do everything necessary in order to complete the title of the vendee by executing a registered deed of conveyance under Sec. 54 of the Transfer of Property Act. A suit by the vendee for execution of such a conveyance is governed by this Article—*Mya Bin v. Maung Kya*, 33 I.C. 761 (Bur.); *Maung Le Dun v. Ma Le*, 9 Bur. L.T. 86, 32 I.C. 573.

On the date of sale of certain immoveable property, the vendor had not been in possession but his title to possession had been adjudged by a decree against which an appeal was pending. The conveyance did not contain any express covenant to deliver possession to the purchaser. After the vendor obtained possession, a suit by the vendee for possession was governed by Art. 136 or 144, and not by this Article—*Sheo Prasad v. Udai*, 2 All. 718.

After the sale of a house by the defendant's father to the plaintiff's father, the former remained in possession according to an agreement in the sale-deed (dated 1880) promising to vacate the house at the end of two years from the date of sale. But the defendant's father, and after his death, the defendant, continued to be in possession of the house, and in 1893 the plaintiff brought a suit for possession of the house. Held that the suit was essentially a suit for possession to which the 12 years' rule of limitation would apply under Art. 139 or 144, and not a suit for specific performance of a promise to vacate the house, to which Art. 113 might apply—*Sivrudrappa v. Balappa*, 23 Bom. 283 (286).

Under a decree against the plaintiff's father certain villages were sold in 1883 and were purchased by the first defendant as the agent of, and at the request of, the plaintiff's father. Afterwards in 1888 the defendant agreed in writing to convey those lands to the plaintiff upon payment of Rs. 90,000. The plaintiff brought a suit in 1900 for declaration of title to and possession of those villages upon payment of such sum as may be fixed by the Court. The High Court decided that the first defendant was a trustee for the plaintiff's father and the suit was one brought by a

beneficial owner for possession on payment of such sums as were due, and was not barred by any rule of limitation. But it was held by the Privy Council that the agreement of 1888 was a contract for sale and the suit was one for specific performance of the contract under Article 113—*Subbaraya v. Rajah of Karvetnagar*, 45 Mad. 641 (P.C.), 37 C.L.J. 426, 68 I.C. 172, A.I.R. 1922 P.C. 345.

473. Other suits :—Where a person who has agreed to execute a lease fails to do so, a suit by the promisee for specific performance of the agreement (*i.e.*, demanding execution of the lease) is governed by this Article, and limitation runs from the refusal of the defendant to grant the lease—*Satya Kinkar v. Rajah Sri Sri Shiba Prosad*, 4 P.L.J. 447 (452), 52 I.C. 452

Where the defendant agreed to give half of the land to the plaintiff who was to help him in recovering it, and then refused to give half of the land after recovery, *held* that this was a suit for specific performance of a contract, and limitation ran when the defendant refused to deliver the land—*Shriram v. Babaji*, A.I.R. 1923 Nag. 47, 71 I.C. 40

A suit by the mortgagor against the mortgagee under a registered mortgage for the balance of the consideration payable by the latter to the former, and for damages in the shape of interest for non-payment of the amount in time, is a suit for compensation for breach of contract in writing registered and is governed by Art. 116; such a suit is not one for specific performance of a contract under Art. 113—*Naubat v. Indar*, 13 All. 200 (204). A suit for recovery of land leased to the plaintiff under an *arthamulgeni* lease is not a suit based merely on the contract in the lease to put the plaintiff in possession, but is a suit for possession based on a completed title to possession acquired by the plaintiff by virtue of the lease, and is governed by Art. 144, not by Art. 113 or 116—*Mogera v. Parameswara*, 31 Mad. 51. Plaintiffs who had contributed to a common fund to be utilised for family requirements, brought a suit claiming that their shares in the said fund should be determined and paid. *Held*, that the claim was one which must be dealt with according to equitable principles apart from any question of partnership and account and that the suit fell under Art. 120 and not under Art. 113 or 106—*Commercial Bank v. Allavooden*, 23 Mad. 583 (592)

A Zemindar granted a lease of certain *chaukidari* *chakran* lands to the lessee. But subsequently the lands were resumed by the Government in consequence of which the lessee lost possession. Many years after, the lands were again made over to the Zemindar by the Government. The lessee thereupon brought a suit to recover possession of those lands from the Zemindar. *Held* that the suit was a suit for possession and not one for specific performance of a contract, because there was no agreement in the lease to grant a *patni* of these lands to the lessee in case the lands were made over to the Zemindar after resumption—*Banwari Mukunda v. Bidhu Sundar*, 33 Cal. 346 (349) (dissenting from *Ranjit Singh v. Radha Charan*, 34 Cal. 564); *Ranjit Singh Bahadur v. Maharaj Bahadur Singh*, 46 Cal. 173 (181) (P.C.)

A deed of exchange contained a covenant that each party would make good any loss caused to the other in case the latter was dispossessed from the lands he got in exchange, by reason of want of title of the former. The plaintiff, in a suit to which the defendant was a party, was declared not to be entitled to a portion of the land received from the defendant in exchange. The defendant refused to give the plaintiff other land in place of the land so lost to him. Thereupon the plaintiff sued the defendant for the recovery of equivalent land. Held that the suit was one for specific performance of the agreement contained in the exchange and was governed by this Article, the cause of action accruing from the date of defendant's refusal—*Hari v. Raghunath*, 11 All. 27 (F.B.). But where A and B exchanged lands under a registered deed which contained the following clause "There is no dispute in respect of the said lands: if disputes should so arise the respective party should be answerable to the extent of his private property" and A, being deprived of some of the lands he got by the exchange, sued B on the above covenant for the value of the lands of which he was dispossessed, held that a suit for failure to pay money according to contract should be regarded as a suit for compensation for breach of contract and not a suit for specific performance. The suit therefore did not fall under Article 113, but under Article 83 read with Art 116—*Srinivasa v. Rengasami*, 31 Mad. 452 (453). Where the parties to a deed of exchange expressly covenanted that if there should arise any dispute in the matter of enjoyment of the property exchanged, each should return to the other what is taken, and then in execution of a decree obtained by a third party against the defendant, some of the lands obtained by the plaintiff were sold away, whereupon the plaintiff sued the defendant to recover possession of the lands given by him to the defendants, held that the suit was not one for specific performance of a contract under Article 113, but a suit for possession governed by Article 143—*Srinivas v. Johnsa Rowther*, 42 Mad. 690 (691).

A transaction whereby certain shares in a company were allotted to the defendant on the understanding that the latter was to transfer the shares to the plaintiffs on their paying him a certain sum of money, does not constitute a trust in favour of the plaintiff for any specific purpose, but an agreement which can be specifically enforced; and a suit for such specific performance by compelling the registration of the shares in the plaintiff's name falls under Art. 113—*Ahmed v. Adtein*, 2 Cal. 323.

A compromise effected in the course of a litigation between the parties is not a contract (just as an award is not a contract), and a suit for recovery of possession of land, based on such compromise is not a suit for specific performance of a contract, but a suit for possession of immoveable property, and would be governed by Art. 144, not by this Article—*Bells v. Mahomed Ismail*, 25 W.R. 521; *Bashewar v. Debi Prasad*, 29 P.R. 1913, 19 I.C. 411.

473A. Registered contract :—A suit for specific performance of a registered contract does not fall under Article 110, because that Article refers to suits for compensation for breach of contracts in

writing registered, and does not apply to suits for *specific performance* of such contracts—*Srinivasa v. Rangasami*, 31 Mad. 452 (453).

474. Starting point of limitation :—In a suit for the specific performance of an agreement entered into in 1858 to grant patta when required, it appeared that the plaintiffs applied to the defendants for a patta in 1874, and in March 1875 the defendants finally refused to make the grant, and the plaintiffs thereupon instituted their suit for specific performance; it was held that limitation ran from the date (1875) when the plaintiffs had notice that their right was denied—*New Beerbhoom Coal Co v. Buloram*, 5 Cal. 175. Where the plaintiff was entitled to get a transfer of a decree from the 1st defendant in case the 2nd defendant paid the 1st defendant a certain sum of money within six months from the date of the agreement, and the 2nd defendant so paid the money, it was held, in a suit brought by the plaintiff for the specific performance of the contract to transfer, that as no specific date was fixed for performance, the second clause of third column applied, i.e., limitation ran from the date of refusal by the 1st defendant to perform the contract, and not from the date of payment by the 2nd defendant—*Venkanna v. Venkata Krishnayya*, 41 Mad. 18 (22), 33 M.L.J. 35, 41 I.C. 807.

Under the second clause of the third column of this Article, specific demand by the plaintiff is necessary to make the date of refusal the starting point—*Virasami v. Ramasami*, 3 Mad. 87. In the absence of a date fixed for performance of the contract, time does not continue to run until there has been a demand and refusal—*Ma Ma Gye v. Ma Nyo Po*, 1 Bur. L.J. 171, A.I.R. 1923 Rang. 44.

Although a suit for specific performance may be brought within three years from the accrual of the cause of action, still if the plaintiff is guilty of laches in bringing his suit within that time (e.g. if the suit is brought on the very last day of limitation), the Court, exercising its discretion with which it is vested under the Specific Relief Act, may think it right to dismiss the suit—*Mokund Lal v. Chotay Lal*, 10 Cal 1061 (1068).

Effect of bar of limitation :—Although the provisions of this Article may prevent the defendant from suing for specific performance of a contract of sale, still he is not debarred from setting up his contract in defence to a suit for possession by the vendor—*Maung Po Kyue v. Maung Po Thin*, 7 Rang 288, 119 I.C. 744, A.I.R. 1929 Rang 251 (252) : The principle is that rules of limitation apply to suits but not to a claim set up by the defendant in defence. See Note 7 at page 6 ante.

114.—For the rescission of a contract. **Three years.** When the facts entitling the plaintiff to have the contract rescinded first become known to him.

475. This Article refers to the rescission of contracts as between promisors and promisees and not to suits by third parties to have the

instrument of contract cancelled or set aside, such suits being governed by Art. 91—*Bhawani v. Bisheshar*, 3 All. 846. The last remark is incorrect, for Article 91 does not apply to a suit brought by a person who was not a party to the instrument sought to be cancelled. See Note 420 (4) ante. A suit for dissolution of a partnership is not a suit for rescission of a contract, and is not governed by Art. 114 but by Art. 120—*Khorasany v. Acha*, 6 Rang. 198, A.I.R. 1928 Rang. 160 (162), 110 I.C. 349. A suit by a plaintiff, as reversioner, to recover possession of a plot of land in an occupancy tenure from the defendant who claims under a purchase from the widow, is not a suit under this Article, as the suit is not brought with the object of rescinding a contract, but falls under Art. 141—*Budda v. Khan*, 141 P.R. 1882. Where the claim to rescission of a contract is based on misrepresentation, time runs when the facts which would have entitled the plaintiff to bring a suit for rescission became known to him, on the analogy of an action for deceit—*Molloy v. Mutual Reserve Life Insurance Co.*, (1906) 94 L.T. 756. In England a suit for rescission of contract is not subject to any law of limitation, but must be brought as soon as the plaintiff knows all the facts, with the utmost promptitude. But in this country, the Legislature has allowed a definite period of three years, and the doctrine of laches is wholly inapplicable to such suits. And although a person may be barred by this Article from bringing a suit as plaintiff for rescission of the contract, he will not be barred from defending a suit on the contract against him, on the ground of misrepresentation—*Mohun Lal v. Sri Gungaji*, 4 C.W.N. 369 (388).

115.—For compensa- Three. When the contract is
tion for the breach years. broken, or (where
of any contract, ex- there are successive
press or implied, breaches) when the
not in writing re- breach in respect of
gistered and not which the suit is
herein specially pro- instituted occurs or
vided for. where the breach is
continuing, when it
ceases.

476. Scope of Article :—This is a residuary Article in respect of suits on contract, and is applicable only when no other Article is appropriate—*Nand Lal v. Partab Singh*, 3 Lah. 326. See also *Johury v. Thakoor Nath*, 5 Cal. 830 (832).

Compensation :—For the meaning of the word see notes under section 29

This Article is not limited to the case of damages for breach of contract, but it is also applicable to a case of liability under a simple debt due—*Sreenath v. Peary Mohan*, 21 C.W.N. 479, 39 I.C. 205. The words "compensation for breach of any contract" do not restrict the operation

of this Article to suits for unliquidated damages for breach of contract but they also include suits for *definite* sums of money agreed to be paid under any contract (e.g. a suit against a *del credere* agent for the value of goods sold by him)—*Dukur Pershad v. Foolcoomaree*, 16 W.R. (P.C.) 35. In *Johury v. Thakoor*, 5 Cal. 830 (832) the word 'compensation' was interpreted in the sense of *damages* and not a specific sum of money payable by the defendant.

A *breach of trust* is not the same thing as a breach of contract; consequently Article 115 does not apply to a suit against a company's directors for misfeasance in the nature of a breach of trust (e.g. misapplication of company's funds). The suit falls under Art 120—*Govind v. Rangnath*, 54 Bom. 226, 32 Bom L.R. 232

477. Suits on contracts :—Where the defendant had agreed to pay a certain rate per acre for lands of his which were watered by a canal of the plaintiff, a suit to recover the amount would not be one for rent (as the hire of water would not come within the definition of rent) but would fall under this Article—*Ala v Sodhi*, 171 P.R. 1883. On the marriage of his son the defendant caused a sum of money to be set apart in the books of his firm in the name of the first plaintiff, his son, for the purpose of making ornaments for the second plaintiff, his son's wife, but the money so set apart was not to be called for three years. It was held that the case was not one of trust or of deposit, but one falling under Article 115; that the contract between the parties was that the money should be paid when he plaintiff demanded it after three years, and that the period of limitation therefore ran from the date of the demand which date must be taken as the date of breach of contract—*Manekji v. Nuserwani*, 20 Bom 8 (13). The defendant agreed to sell to the plaintiff certain goods belonging to another person on the implied representation that he had authority from that person to sell those goods, when in fact he had none. He failed to sell those goods to the plaintiff. A suit by the plaintiff for compensation for breach of the contract falls under this Article. It is an action connected with and arising out of *contract*, and not one arising in tort, and therefore Article 36 does not apply—*Vairavan v. Avicha*, 38 Mad. 275 (277). Where a dispute between the proprietor of certain land and his lessees, with regard to the mineral rights, was settled by a decree in terms of a written compromise entered into by the parties to the suit, under which the lessees were liable to pay to the proprietor a specific royalty on the amount of coal raised, *held* that a suit for recovery of the royalty was governed by Art 115 as being a suit based upon the agreement of compromise. The agreement did not cease to be an agreement because it was confirmed by a decree—*Smith v Kinney*, 2 Pat. 749 (752), A I.R. 1924 Pat 231, 81 I.C. 299.

After an adjustment of accounts between the landlord (plaintiff) and the tenant (defendant), the defendant was found liable for Rs 158 on account of rent. It was arranged that the sum of Rs 150 should be left with the defendant as deposit for payment to the superior landlord on

account of rent payable by the plaintiff to the latter, and that the balance was to be paid to the plaintiff. The amount of Rs. 136 not having been paid to the plaintiff's landlord, he sued the plaintiff and obtained a decree for Rs. 225 which was realised from the latter. The plaintiff then brought a suit against the defendant to recover the amount which he had to pay to his superior landlord. *Held* that by the arrangement between the landlord and tenant for the payment of Rs. 136 to the superior landlord, the amount ceased to be rent, and the claim for recovery of the amount which the plaintiff had to pay to the superior landlord is one for damages under this Article and not for rent under Article 110—*Lachmi Missir v. Deoki Kuar*, 19 C.W.N. 174, 19 I.C. 752.

When the parties had agreed on the 2nd April 1905 that a settlement of partnership accounts between them should be made upon a certain basis and the final adjustment took place on the 20th August 1906 and entries to that effect were made in the books on that date but not signed by the parties, and a suit was brought on the 6th April 1908 to recover the amount due on such adjustment, *held* that the suit was governed by Article 115 or 120, and as the adjustment of 20th August 1906 gave rise to a fresh cause of action from that date the suit was not barred—*Jalim Singh v. Choonee Lall*, 15 C.W.N. 882 (887), 11 I.C. 540.

Where a judgment-debtor paid a portion of the decree-amount to the decree-holder out of Court, but the latter took out execution without giving credit for it, a suit by the judgment-debtor to recover the amount paid by him out of Court and for damages is governed by Article 115—*Ganpat v. Kirparam*, 79 P.R. 1892; *Gopala Swami v. Nammalwar*, 36 M.L.J. 176, 48 I.C. 810. A suit by a broker to recover commission on certain sales is governed by this Article; it is not a suit for wages governed by Art. 102—*Sushil v. Gauri*, 39 All. 81 (84). A suit by a purchasing agent for money due for the purchase of stores for Government is governed by this Article—*Doya Narain v. Secretary of State*, 14 Cal 256.

Articles 115 and 116 are meant to *particular and specific contracts* that are broken. A suit under sec. 235 of the Indian Companies Act by an official liquidator against the auditor and the directors calling upon them to make good a large sum of money on the ground that as between themselves they have allowed the money of the Company to be mis-spent, is not governed by Article 115 or 116 but by Art 120—*In re Union Bank*, 47 All. 699, 23 A.L.J. 473, A 1 R 1925 All 519. See also *Govind v. Rangnath*, 54 Bom. 226, 32 Bom. L.R. 232.

As to suits against a carrier for compensation for non-delivery or short-delivery of goods, see Notes 309 and 312 under Articles 30 and 31.

A suit for damages for use and occupation against a tenant holding over may fall under this Article—*Madar v. Kader Moideen*, 39 Mad. 54 (56).

Suit for money lent payable within fixed time:—A suit to recover money lent with interest upon an agreement that the loan should be repaid within a fixed time, (e.g. within one year) is governed by this

Article and not by Article 57—*Rameshwar v. Ram Chand*, 10 Cal. 1033; *Ramasami v. Muttusami*, 15 Mad. 380. See Note 355 under Article 57.

Suit for Malikana:—A suit for *malikana*, where the plaintiffs do not seek to enforce the charge upon the land, is governed by Art 115, in as much as the claim in such a case arises out of a quasi-contract created by law—*Kallar v. Ganga*, 23 Cal 998. If the suit is one to enforce the charge on the land, Art 132 would apply

A suit for compensation for wrongfully withholding payment of *malikana* is governed by Art 115; the plaintiff is entitled to damages upon each annual sum in arrear only for three years prior to suit—*Mahamaya v. Ramkhelawan*, 15 C L J. 684, 15 I C. 911.

Suit against surety:—A borrowed a sum of money from the plaintiffs on a promissory note payable on demand, and the defendant had guaranteed the repayment of the loan if A made default in payment. It was held that the suit against the surety fell under this Article, and the cause of action arose on the same date as it arose against the principal debtor, viz., the date of execution of the promissory note—*Brojendra Kishore v. Hindusthan Co-operative Insurance Society*, 44 Cal. 978; *Sreenath Roy v. Peary Mohan*, 21 C.W.N. 479, 25 C.L.J. 91, 39 I.C. 205

Suit by official liquidator to recover unpaid calls of forfeited shares:—A suit by official liquidator, after the winding up of a company, to recover the unpaid calls from a shareholder whose shares had been forfeited before the winding up of the company, is governed by this Article. As the shareholder ceases to be a member of the company, on forfeiture, his liability to pay future calls is gone, and all that it left is a new liability to pay the company "all moneys which at the date of forfeiture were presently payable by him to the company in respect of the shares." Such person is liable to pay the unpaid calls not as a contributory, but as a debtor to the company. This gives the company a fresh cause of action, and the period of limitation for a suit to enforce this new obligation begins to run from the time the shares are forfeited—*Maneklal v. Suryapur Mills Co., Ltd.*, 52 Bom 477, 30 Bom. L R 549, A I R 1928 Bom. 252 (253), 110 I C 33

Breach of implied contract —The expression 'implied contract' is used in this Article in the sense in which it is understood in English law. The Contract Act and the Limitation Act are not statutes in *puris materiis*, and it should not be assumed that Article 115 is confined to cases of what would be implied contracts according to the definition given in sec. 9 of the Contract Act. The result of confining it to such cases would be that where a suit is instituted against the principal and an agent together and relief is claimed against them in the alternative according as the act was authorised or not by the principal, a different period of limitation would be applicable against each of them, though the obligation arises out of the same transaction. This could not have been intended by the legislature—*Vairavan v. Aricha*, 38 Mad 275 (278). See this case cited *ante*

A suit for compensation for the subsidence of plaintiff's tank, caused by the removal of pillars of coal in the coal mine belonging to the defen-

dant, falls under this Article, as it is a suit based on an implied covenant running with the land that the surface-owner had the inherent right of support from the underground mines—*Jagannath v. Kali Das*, 8 Pat. 776, A.I.R. 1929 Pat. 245 (246, 247), 120 I.C. 626; and the period of three years ran from the time when specific injury was caused (sec. 24), viz., when the subsidence took place—*Ibid*. Where a doctor is engaged to treat a patient without any arrangement being made at the time as to his fees, there is an implied contract, an action for breach of which is governed by this Article—*Hurish v. Brojonath*, 13 W.R. 96. A suit by some of the proprietors of a village against the *lambardar* for an account of the profits of the village is governed by this Article, or Article 89, and not by Art 120; because in so far as the proprietors permit the *lambardar* to collect rents and manage the village on their behalf, he is an agent and as such bound by an implied contract to render an account at the end of each agricultural year. Limitation runs from the date when the account ought to have been rendered under the implied contract—*Anantram v. Ganeshram*, 4 P.L.J. 304 (305), 51 I.C. 733.

The plaintiff sued the defendant who had married the plaintiff's deceased brother's widow to recover, by way of compensation, the money expended by his deceased brother's family on the marriage, founding his claim upon a custom of the Jats of Ajmere, whereby a member of that community marrying a widow is bound to recoup the expenses incurred by her deceased husband's family on his marriage. It was held that this was a suit for compensation for breach of an implied contract, and it fell under this Article—*Madda v. Sheo Baksh*, 3 All. 385.

478. Successive breaches:—In a suit for breach of a contract to be performed at different times, the period of limitation must be calculated from each breach of contract as it arises. Where there is a contract for performing certain duties in each of several years, each breach of the contract is a complete cause of action, and damages are recoverable for each separately—*Mahi Sahu v. Forbes*, 6 W.R. Act. X, 61.

Upon failure to pay the principal and interest upon the day appointed for such payment, a breach of the contract to pay is committed, and the fact that the money subsequently remains unpaid does not constitute successive breaches within the meaning of this Article—*Mansab Ali v. Gulab Chand*, 10 All. 85.

Successive breaches happen in those cases only in which there is a promise to perform periodically, such as payment of rent or of annuity; continuing breach applies only to contracts obliging one of the parties to adopt some given course of action during the continuance of the contractual relation—*Raghubar v. Jaij Raj*, 34 All. 429 (431); U. N. Mitra's Limitation, p. 304.

Where a decree-holder does not certify a payment made to him out of Court by the judgment-debtor, and applies for execution without giving credit for such payment, a suit by the judgment-debtor for any damage he may have suffered by the decree-holder's neglect to certify and by the

proceedings in execution, is one for breach of the implied promise to certify the payment to Court and is governed by this Article. The filing of the execution petition in itself gives a cause of action, though no money may have been realised, and successive applications will give rise to successive breaches and fresh causes of action. If money is subsequently realised, that will give rise to a further breach of the covenant and a fresh cause of action—*Gopalasami v. Nammalvar*, 36 M.L.J. 176, 48 I.C. 810.

479. Continuing breach :—Where the lessor fails to give delivery of possession of a portion of the land demised to the lessee on account of the obstruction by a person claiming under a paramount title, the breach, whether it be considered as a breach of a covenant to deliver possession or of a covenant for quiet enjoyment, occurs once for all on the date of failure to deliver possession, and is not continuing but complete and final; consequently, the period of limitation for a suit by the lessee for damages for breach of the covenant commences to run from the date of such failure and not from the close of the term of the lease—*Secretary of State v. Pemmaraju*, 40 Mad. 910 (919), 30 M.L.J. 575, 35 I.C. 254.

Specific injury .—See 8 Pat. 776 cited under “Breach of implied contract” supra.

<p>116.—For compensation for the breach of a contract in writing registered.</p>	<p>Six years. When the period of limitation would begin to run against a suit brought on a similar contract not registered.</p>
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479A. Scope :—The Limitation Act has drawn a broad distinction between unregistered and registered instruments. The words “not specially provided for” which occur in Article 115 do not find a place in Article 116, and the conclusion is that if the instrument is registered, Article 116 will apply in spite of the fact that a special provision has been made in some other Article in respect of a similar instrument not registered. Therefore a suit to recover royalties due under a registered lease is governed by Article 116 and not by Article 110—*Tricomdas v. Gopinath*, 44 Cal 759, 767 (P.C.), 44 I.A. 65. See also *Ram Rachhya v. Raghunath*, 8 Pat. 860, A.I.R. 1930 Pat. 46 (49) (suit held governed by Art. 116 and not by Art 111); *Lakhpai v. Durga*, 8 Pat. 432, A.I.R. 1929 Pat 388 (390) (suit governed by Art. 116 and not by Art 97).

The word ‘compensation’ in this Article need not be restricted to a suit for unliquidated damages, and can be held to include a claim for a sum certain—*Ganappa v. Hammad*, 49 Bom 596, A.I.R. 1925 Bom. 440; *Tricomdas v. Gopinath*, supra. The term ‘compensation’ is wider than the term ‘damages’; it includes all claims whether they sound in debt or in damages. The expression ‘compensation’ is not ordinarily used as an equivalent of damages, although compensation may have to be measured

by the same rule as damages. The word is commonly used to mean something given or obtained as an equivalent—*Id. Mazaharal v. Md. Azimuddin*, 27 C.W.N. 210, 73 I.C. 17, A.I.R. 1923 Cal 507.

The word 'compensation' not only applies to cases in which a specified sum of money due on a registered bond is sued for, but also applies to cases where the vendee having agreed to apply a portion of the consideration-money to the payment of a previous debt due by the vendor to a third person, fails to make that payment, in consequence of which the vendor himself has to pay his creditors and then brings a suit to recover the money from the vendee—*Ram Rachhya v. Raghunath*, 8 Pat. 860, A.I.R. 1930 Pat. 46 (50), 122 I.C. 244; see also *Ishri Prasad v. Muhammad Sami*, 19 A.L.J. 81, 60 I.C. 829, A.I.R. 1921 All. 133; *Raghubar v. Jaij Raj*, 34 All 429

The word 'contract' in the Article means a contract 'express or implied'; the words 'express or implied' used in Article 115 should be read into Article 116. It will therefore include an implied contract, e.g., a covenant of title and quiet possession which is implied in a deed of sale under sec 55 (2) of the Transfer of Property Act. A suit by the vendee for return of purchase money owing to the defect of title of the vendor is governed by this Article—*Ganappa v. Hammad*, (supra); *Hanwant v. Chandu*, 51 All 651, 27 A.L.J. 433, A.I.R. 1929 All. 293 (295).

This Article applies where the breach is committed by the *defendant*. If the contract goes off on account of a breach committed by the *plaintiff*, a suit brought by him under sec. 65, Contract Act, to recover the money paid by him under the contract, is governed by Art. 97 and not by Art. 116—*Anant v. Sarup*, 26 A.L.J. 492, A.I.R. 1928 All 360 (363).

480. Registered contract :—It was held in an earlier Madras case that the word 'registered' in this Article must be read as defined in the General Clauses Act, sec 3 (45). Under that section the term 'registered' includes documents registered under any special law, such as the Companies Act, Copyright Act, as well as documents registered under the Registration Act. Therefore, a suit by a shareholder against a company registered under the Companies Act to recover dividends was governed by this Article as the right to the dividends arose out of the contract between the shareholders and the members of the Company which is embodied in the registered memorandum and articles of association—*Ripon Press and Sugar Mill Co. Ltd v. Venkatarama*, 42 Mad 33 (34, 35), 35 M.L.J. 253, 48 I.C. 903. But this decision has now been overruled by the Full Bench case of *Rama Seshayya v. Tripurasundari Cotton Press*, 49 Mad. 468, 50 M.L.J. 520, 94 I.C. 515, A.I.R. 1926 Mad. 615, (Full Bench Reference on appeal from 48 M.L.J. 563, A.I.R. 1924 Mad 721), where it has been held that the relation between a shareholder and the company is not a contractual relation, and a suit by a shareholder of a limited company for recovery of arrears of dividend is a claim for a debt, and as the Limitation Act does not specially provide for such suit, Article 120 would apply. The Judges of the Full Bench further remarked that the word 'registered' in this

Article should be interpreted in the ordinary sense of registration under the *Registration Act*, and the deposit of the Memorandum and Articles of Association with the Registrar of Joint Stock Companies did not amount to registration. The Bombay High Court has once doubted whether the word "registered" would apply to registration of a Company under the Companies Act and holds that a suit by an official liquidator of a company against a shareholder does not fall under Art 116—*Manecklal v. Surjapur Mills Co., Ltd.* 52 Bom 477, A I R 1928 Bom 252 (256). In a later case of the same High Court, however, it has been said that the word 'registered' in this Article includes articles of association registered under the Indian Companies Act, and is not confined to registration under the Registration Act; but it has also been observed that a suit against the directors of a company does not fall under Art. 116, as it is not strictly speaking a suit on a contract, because the whole of the contract governing the relationship of the company and its directors is not in writing registered, but part only, that which is contained in the article of association. Art 120 applies to the suit—*Govind v. Rangnath*, 32 Bom. L.R. 232. In England, however, the relation between a company and its shareholders is treated as a *contractual relation*, and the moneys (e.g. dividends) due from a company, in pursuance of its articles of association, to its members to whom share-certificates have been issued under the company's seal, are treated as specialty debts, since the articles rank as a deed between the company and its members. See Lightwood, p. 196. In India also, it has been held in an Allahabad case that the relation between a company and its directors is a contractual relation constituted by the Articles of Association: See 47 All. 699 cited in Note 317 under Art. 36.

A suit instituted not by a shareholder but by a purchaser in Court auction of the shares of a company, to recover the arrears of dividends in respect of those shares, is governed by Article 120, and not by Article 116—*Ramaseshayya v. Tripurasundari Cotton Press*, *supra*.

481. Suit on registered bond:—A suit is none the less a suit for compensation for breach of contract in writing registered, within the meaning of this Article, although it has been brought for recovery of a specified sum of money on a registered bond or other contract—*Gonesh v. Madhavray*, 6 Bom. 75; *Ram Narain v. Adindra*, 17 C.W.N. 369, 13 I C 440, 15 C.L.J. 17; *Nabacoomar v. Siru Mullick*, 6 Cal. 94; *Girijanand v. Sailajanand*, 23 Cal. 645 (663); *Ethel Kerr v. Clare Ruxton*, 4 C.L.J. 510; *Husain v. Hafiz*, 3 All 600; *Khunni v. Nasiruddin*, 4 All 255; *Gouri v. Surju*, 3 All. 276; *Magaluri v. Narayan*, 3 Mad 359; *Challaphroo v. Banga*, 20 C.W.N. 408, 22 C.L.J. 311; *Seshayya v. Annamma*, 10 Mad 100; *Rathnasami v. Subramanya*, 11 Mad 56; *Ram Buksh v. Moghar*, 86 P.R. 1881; *Collector of Etawah v. Beti Maharani*, 14 All 162; *Nistarini v. Chandi*, 12 C.L.J. 423, 8 I C 788; *Susil v. Gauri*, 39 All. 81.

This Article applies to a suit against an Infant on a registered bond given for necessities, but in such a case it is requisite that the conside

tion for which the bond is given should be proved, and then the bond becomes a registered contract which binds the infant—*Sham Charan v. Choudhury Debja*, 21 Cal. 872.

482. Suit on instalment bond :—This Article is applicable to a suit on a registered instalment bond, notwithstanding the express provisions of Art. 74. The present Article is intended to apply to all contracts in writing registered, whether there is or is not an express provision in this Act for similar contracts not registered—*Din Dayal v. Gopal*, 18 Cal. 506, *Rup Narajana v. Gopi*, 11 C.W.N. 903.

483. Suit on personal covenant in mortgage :—This Article, and not Article 132, applies to a suit by a mortgagee against the mortgagor to recover money on the basis of the personal covenant in the mortgage, and time runs from the date when the money becomes due under the mortgage—*Raghubar v. Lachmin*, 5 All. 461 (462); *Kameshwar v. Raj Kumari*, 20 Cal. 79 (84) (P.C.); *Miller v. Ranganath*, 12 Cal. 359 *Rathnasami v. Subramanya*, 11 Mad. 56 (59); *Rahmat v. Abdul*, 34 Cal. 672 (675), *Ram Narayan v. Nand Kumar*, 25 O.C. 161, *Ram Narain v. Adindra*, 17 C.W.N. 369, 13 I.C. 440; *Dinkar v. Chhaganlal*, 38 Bom. 177 (181), *Ratnasabapathi v. Daivasigamani*, 52 Mad. 105 (F.B.), 56 M.L.J. 10, A.I.R. 1929 Mad. 53 (58, 59), 116 I.C. 817, *Chengalamma v. Veeraraghava*, 55 M.L.J. 500, A.I.R. 1928 Mad. 1121 (1126), 114 I.C. 340, *Kishen v. Raghunath*, 51 All. 473, A.I.R. 1929 All. 139 (141), 116 I.C. 488, *Kaloo v. Sundarabai*, 95 I.C. 707, A.I.R. 1926 Nag. 449, *Jai Indra v. Khairati*, 4 Luck. 107, 113 I.C. 489, 5 O.W.N. 836, A.I.R. 1928 Oudh 465 (468); *Sheo Dass v. Kunj Behari*, 5 O.W.N. 1128, 114 I.C. 813; *Surai Baksh v. Munnoo*, 6 O.W.N. 974; *Thamman v. Dalchand*, 9 O.L.J. 171, A.I.R. 1922 Oudh 113. In a recent Privy Council case it has been held that the suit is governed by Article 66—*Ganesh Lal v. Khetramohan*, 5 Pat. 585 (P.C.), 53 I.A. 134, 31 C.W.N. 25, A.I.R. 1926 P.C. 56, 95 I.C. 839. But, as pointed out by the Indian High Courts, it is not clear whether the mortgage in that case was validly and properly registered; and it was unnecessary for the Judicial Committee to decide whether the 3 years' rule (Art. 66) or six years' rule (Art. 116) applied, as in either case the suit was barred, having been brought 10 years after the due date of the mortgage. See *Ratnasabapathi v. Daivasigamani* and *Chengalamma v. Veeraraghava*, supra. In *Lalubai v. Naran*, 6 Bom. 719 (F.B.) (overruling *Pestonji v. Abdul Rahiman*, 5 Bom. 463) it was held that a suit for a simple money decree on a mortgage was governed by Article 132. But this Bombay Full Bench case must be deemed to have been overruled by the Privy Council case of *Ramdin v. Kalia*, 7 All. 502 in which their Lordships have laid down that Article 132 applies only to suits brought for money charged upon immoveable property for the purpose of recovering it out of the property so charged.

In this Privy Council case (7 All. 502, at p. 505) the Judicial Committee had made an inadvertent remark that a suit for recovery of money personally from the mortgagor (under a registered mortgage)

must be brought within the same period of limitation as a suit on a bond for money, viz three years. This ruling cannot be supported, "and from the fact that no cases are referred to in the judgment, it would appear that none were cited in the argument, and that the Privy Council consequently were not aware of the current of decisions in India"—Starling, 5th Ed. p. 363. In the Bombay case of *Dinkar v. Chhaganlal*, 38 Bom. 177 (181), Shah J observes: "With regard to the observations of *Ramain v Kalka*, I may say that having regard to the facts of that case the only point which arose for decision was whether for the purposes of personal liability the period of 12 years under Art. 132 applied to the case. There was no point in that case as to whether the period of limitation would be three years or six years. Therefore the observations in the case of *Ramdin v Kalka* about the shorter period of three years being applicable were not necessary for deciding the appeal. As the observations in the case of *Kameshwar v Raj Kumari*, 20 Cal. 79 (84), 19 I.A. 234, are in consonance with the current of decisions of the Indian Courts and in conflict with the dictum in the case of *Ramdin v Kalka*, I think it would be proper to accept the view which has found favour with the Indian Courts."

A usufructuary mortgage contained a stipulation that if the mortgagor failed to deliver possession, the mortgagee might bring the mortgaged property to sale. Possession of the property not having been delivered, the mortgagee brought the mortgaged properties to sale, and as the sale of the property did not satisfy the mortgage-debt, he applied for a personal decree (under sec. 90 Transfer of Property Act). Held that in order to find whether the application for personal decree is maintainable, the Court will have to see whether the suit was brought within the period of limitation prescribed by this Article. If the suit for sale of the mortgaged property had been brought within six years of the expiry of the term of the mortgage the amount sought to be recovered by the personal decree was legally recoverable—*Sheo Charan v. Lalji*, 18 All 371 (372); *Jangi Singh v. Chander*, 30 All. 388 (389).

Even though a mortgage-deed contains no express personal covenant to pay the debt, still a personal covenant is implied in, and is an essential part of, every simple mortgage; and a suit for personal remedy against the mortgagor is governed by this Article—*Jangi Singh v. Chander*, 30 All. 388, 389 (dissenting from *Sawaba v. Abaji*, 11 Bom 475).

When a mortgagee is deprived of his security, under a decree of a Civil Court, he is entitled to proceed personally against the mortgagor; such a suit is governed by Article 116, and limitation runs from the date of deprivation of the security and not from the date of the mortgage—*Maung Yan v. Maung Po*, 3 Rang. 60, 89 I.C. 56, A.I.R. 1925 Rang. 223. Where the mortgagee's remedy against the mortgagor personally is barred, it is also barred against his surety or representatives—*Kaloo v. Sunderabai*, A.I.R. 1926 Nag. 449, 95 I C: 707.

Where a registered instalment mortgage bond contained a covenant that in case of default in payment of an instalment the mortgagee would

be entitled to take possession, and that if there be failure in delivering possession, the mortgagee would be entitled to recover the entire amount, from the person or the mortgaged property or the other property of the mortgagor, a suit to recover the mortgage-money personally from the mortgagor upon failure of the mortgagor to pay an instalment, was a suit for compensation for breach of contract under this Article and was in time if brought within 6 years from the date of the default—*Collector v Dawan*, 30 All 400 (402). An instalment mortgage bond executed in 1909 provided that the mortgage amount was to be repaid by nine annual instalments, and contained a stipulation that if there was default in the payment of any instalment, the mortgagee would be entitled to demand the full amount secured by the bond. Default was made in the very first instalment in September 1909, and the mortgagee brought the present suit on 13th January 1920 (*i.e.* more than 6 years after the first default) to recover the money personally from the mortgagor. Held that the suit was not barred in respect of the instalments that fell due within six years of the date of the suit., *viz.* the instalments from September 1914 to 1917. The fact that the suit was not brought within six years from the first default did not bar the entire claim, because it was left to the option of the creditor to demand the entire amount on default of payment of an instalment, and it was not obligatory on the creditor to bring a suit for realisation of the entire amount as soon as a default was made in the payment of an instalment.—*Ramsekhar v Mathura*, 4 Pat 820, 90 I C 249, A I.R 1925 Pat 557.

Other suits on mortgage .—

A suit by a usufructuary mortgagee for refund of the mortgage money on account of the mortgagor's failure to put the mortgagee in possession of the property is a suit for breach of the mortgagor's liability to give possession, imposed by sec. 68 of the Transfer of Property Act, and is governed by this Article—*Umichaman v. Ahmed*, 21 Mad. 242.

Where a mortgage-deed is executed by the father in a Mitakshara joint family, under circumstances that it is not binding on the sons, the mortgage cannot be enforced against the mortgage-security the mortgagee would be entitled only to a money-decree against the sons, and the suit falls under this Article—*Surju Prasad v. Golab Chand*, 27 Cal. 762 (767). But if it is executed under circumstances that the debt becomes binding on the sons, (*i.e.* if the debt is incurred for the purposes of the family, and not for immoral purposes) it will be enforceable against the estate, and the suit will undoubtedly fall under Article 132—*Maheswar v. Kishun Singh*, 34 Cal. 184 (190).

A suit by a mortgagor to obtain from the mortgagee the amount expressed in a registered mortgage-deed to have been advanced but which was not paid by the mortgagee, together with damages for non-payment, is governed by this Article and not Art. 113, because the withholding of payment of the mortgage money by the mortgagee to the mortgagor would amount to a breach of contract, and the suit to recover the money is nothing other than a suit for compensation for damages caused by the breach of contract, and in the absence of any specific provision to the

contrary, time will run from the date of execution of the mortgage-deed—*Naubat v. Indar*, 13 All. 200 (204)

If a mortgage-deed is registered by a Registering Officer within whose jurisdiction the mortgaged property is not situate, the deed will be treated as a simple registered money-bond; and a suit for money based upon the bond will fall under this Article—*Joginee v. Bhoop*, 29 Cal. 654 (663).

483A. Interest after due date :—Where there was no stipulation in a mortgage-deed to pay interest after the day fixed for the repayment of the mortgage-money it was held by the High Courts in India that the mortgagee could not claim *interest* after the time fixed for repayment of the mortgage-money, but could claim only *damages* in lieu of interest as long as the mortgage-money remained unpaid after the due date, that the damages were not a charge on the mortgaged property under article 132, and that a suit for the recovery of such damages fell under article 116 and must be brought within six years from the due date of the mortgage—*Bhagwant v. Daryao*, 11 All. 416 (420); *Narindra v. Khadim Hossein*, 17 All. 581 (587); *Gudri Koer v. Bhubaneswari*, 19 Cal. 19 (25), *Golam Abbas v. Mahomed Jaffer*, 19 Cal. 23 (Note), *Badi Bibi v. Sami Pillai*, 18 Mad. 257 (262), *Thayar v. Lakshmi*, 18 Mad. 331 (334); *Mansab Ali v. Gulab Chand*, 10 All. 85. A Full Bench of the Calcutta High Court has laid down that though a mortgage bond contains no stipulation for payment of interest after the due date, the mortgagee is entitled to *interest* for six years. That is, the Court awarded *interest* (and not merely *damages*) but held that the claim for interest was governed by Art. 116—*Moti Singh v. Ramohari*, 24 Cal. 699 (703) (F.B.).

But the question has been settled by the Privy Council in the case of *Mathura Das v. Raja Narindar*, 19 All. 39, 50 (P.C.), 23 I.A. 138, (on appeal from 17 All. 581) where their Lordships held that even though the mortgage-deed did not expressly stipulate for payment of interest after due date, the mortgagee was entitled to claim post-diem interest *as interest* (and not merely damages) and that the claim for such interest was not governed by Article 116 (but by Art. 132). In this case the mortgage was dated 17th February 1880, and the mortgage-money was payable with a certain rate of interest 'within a year'. The mortgagee sued on his mortgage in June 1890. Their Lordships held that the mortgagee should be granted the usual mortgage-decree for the principal with *interest up to the date of the decree*. The Calcutta High Court has also held in another case that although there is no stipulation for payment of interest after the due date of the mortgage, the Court is entitled to allow interest at reasonable rate after the due date, under the provisions of the Interest Act, until the final order for sale. And this interest is to be recovered from the property in the same way as the mortgage-money—*Bikramjit v. Durga Dayal*, 21 Cal. 274 (278). That is, Art. 132 would apply to the claim for interest.

A mortgage-bond stipulated that interest at a certain rate should be paid annually and there were no words limiting this liability to the time

fixed for the payment of the principal; it appeared from the evidence that interest had been paid for several years after the due date; it was held that the interest was a charge on the property, and that the claim for interest fell under Art. 132—*Vithoba v. Vigneshwar*, 22 Bom. 107 (110, 111).

484. Breach of covenant of title and quiet possession :

—Where the vendor sold under a registered sale-deed a property of which he was not in possession, and even afterwards failed to secure possession to the purchaser owing to his (vendor's) defect of title, held that a covenant of title and quiet possession being implied in every transaction of sale, under sec. 55 (2) of the Transfer of Property Act, the failure to give possession to the purchaser must be regarded as a breach of contract in writing registered, and a suit by the purchaser for refund of his purchase-money would be governed by this Article (and not by Art. 97)—*Krishnan v. Kannan*, 21 Mad. 8; *Ganappa v. Hammad*, 49 Bom 596, A.I.R. 1925 Bom. 440, 89 I.C. 59. See also *Arunachala v. Ramasami*, 38 Mad. 1171, *Kasturi Naicken v. Venkatasubba*, 1 M.L.J. 162, *Narayana v. Pedda Rama*, 1 M.L.J. 479; *Pirbhu v. Wazirbai*, 11 N.L.R. 186, 31 I.C. 877, *Chidambaram v. Sivathasamy*, 15 M.L.J. 396; *Ramadhan v. Purshottam*, 22 N.L.R. 49, A.I.R. 1926 Nag. 109; *Multan Mal v. Budhumal*, 45 Bom 955 (1960), *Sigamani v. Manibadra*, 49 M.L.J. 668, A.I.R. 1926 Mad 255, 91 I.C. 514. See also Note 436 under Art. 97. A suit for refund of purchase money which is in substance a suit based on a registered document and can be regarded as a suit for breach of a contract (e.g. implied contract under sec. 55, Transfer of Property Act), is governed by Art. 116, and if Art. 116 does apply, then it is quite immaterial to consider whether the case falls under some other Article (e.g. Art. 97)—*Lakhpai v. Durga*, 8 Pat. 432, A.I.R. 1929 Pat. 388 (390), 117 I.C. 654 (following *Tricamdas v. Gopinath Jiu*, 44 Cal. 759 P.C.) Where a sale-deed contained an express covenant that in the event of the purchaser losing part of the property sold owing to defect of title of the vendor or to any other cause, he would be entitled to a refund of the proportionate part of the purchase-money; a suit for such refund upon failure to get possession of a part of the property was governed by Art. 116 and not by Art. 97—*Mul Kunwar v. Chatter Singh*, 30 All 402. Similarly where a sale-deed set out that the property was unencumbered, and there was a covenant that if the purchaser was dispossessed of any part of the property, he would get a refund of a proportionate part of the purchase-money, a suit for such refund upon his being dispossessed of a part of the property by a prior incumbrancer fell under this Article and not Art. 97, and must be brought within six years from the date of dispossession—*Ram Jaggi v. Kauleshar*, 30 All. 405 (Note). A registered deed of sale executed in 1905 recited: "If there is any dispute in respect of the property by relations and others, we (vendors) shall settle them at our own expense and we shall be bound to carry out this sale without obstruction." The son of one of the vendors sued to set aside the sale as regards the share of his father, and obtained a decree in 1913 for possession of that share. Thereafter a

suit was brought by the vendee in 1917 for recovery of the part of the purchase-money corresponding to the share of the property lost to him. *Held* that the suit was one for compensation for breach of covenant of title and was governed not by Article 97 but by Article 116; the period of limitation ran from the date when the covenant was broken (the date of the decree of 1913 or the date of dispossession in pursuance of that decree) and the suit was not barred—*Sistla Subbayya v. Pacha Pitchanna*, 43 M.L.J. 64, 68 I.C. 190, A.I.R. 1923 Mad. 28. In an Allahabad case, the learned Judges followed the Privy Council decision of *Hanuman v. Hanuman*, 19 Cal. 123 (P.C.) and applied Article 97 instead of Article 116—*Kundan v. Bisheshar*, 50 All. 95, A.I.R. 1927 All 734, 103 I.C. 165. But this ruling has been disapproved of in a recent case of the same High Court, *Hanwant v. Chandi*, 51 All. 651, 27 A.L.J. 433, 119 I.C. 243, A.I.R. 1929 All 293 (295).

The defendant as the Karnavan of a tarwad executed for consideration an *ekrar* granting a license to the plaintiff for cutting trees in a forest belonging to the tarwad. In a subsequent suit it was decided that the *ekrar* was not binding on the tarwad and the plaintiff was restrained from cutting trees. The plaintiff thereupon sued to recover the money advanced under the *ekrar*. *Held* that as the license was neither a sale nor a lease of immoveable property within the definition of those terms under the Transfer of Property Act, a covenant for title and quiet enjoyment could not be implied under sec. 55 (2) or section 108 (c) of that Act, and consequently the suit could not be treated as one for compensation for breach of a registered contract under section 116, but that the suit fell under Article 62 or 97—*Mammikutti v. Puzhakkal*, 29 Mad. 353 (357, 358).

Where a registered deed of sale contained a covenant that if the land actually conveyed proved to be less than the land purported to be conveyed, or if the profits of the property proved to be below a certain amount stated in the deed of sale, the seller would refund a proportionate amount of the purchase-money, a suit for such refund was held to fall under this Article and not under Art. 65—*Kishen Lal v. Kinlock*, 3 All 712; *Amanat v. Ajudhia*, 18 All 160.

485. Suit for unpaid consideration.—Where under a registered sale-deed, the vendee agrees to pay, out of the consideration-money, a debt due by the vendor to his (vendor's) creditor, but the vendee not having made the payment, the vendor himself pays his creditor, and then brings a suit to recover the amount from the vendee, *held* that the suit falls under Article 116—*Ram Rachhya v. Raghunath*, 8 Pat 860, A.I.R. 1930 Pat 46 (50). Where a subsequent mortgagee having agreed with the mortgagor to apply a portion of the consideration money towards payment of a prior mortgage fails to do so, in consequence of which the prior mortgagee brings a suit for sale and the mortgagor has to pay the amount to avert the sale, *held* that a suit by the mortgagor to recover the amount from the subsequent mortgagee

falls under this Article—*Ishri Prasad v Md Sami*, 19 A.L.J. 81, '60 I.C. 829, A.I.R. 1922 All 133. Where the vendees covenanted with the vendors to pay a portion of the consideration-money to the mortgagee of the vendors, but they did not pay in accordance with the covenant, in consequence of which the mortgagee sued the vendors upon his mortgage and obtained a decree, but the vendors however *did not* pay any money under the decree, and then they brought a suit against the vendees for compensation for breach of the covenant, *held* that the suit was maintainable and it was not necessary that the vendors should have suffered any loss (*i.e.*, should have paid any money under the decree) before they could bring their suit, that the suit was governed by this Article.—*Raghubar v. Jay Raj*, 34 All 429 (431). As to the starting point of limitation for such suits, see these cases cited in Note 490 below.

But if the vendor frames his suit as one for "enforcement of his lien" on the property for his unpaid purchase-money, in accordance with the provisions of sec 55 (4) (b) of the Transfer of Property Act, the suit falls under Article 132 and not under Art 116, and time runs from the date of the sale-deed—*Kallu v Ram Das*, 26 A.L.J. 53, A.I.R. 1929 All 121 (122), 107 I.C. 679.

486. Suit on breach of covenant in exchange-deed :—
—Where a registered exchange-deed contained a covenant to indemnify, in case of either party being deprived of the property acquired by exchange, the case was governed by Article 83 read with Article 116, and a suit brought by the plaintiff within six years from the date of his being deprived of some of the lands, was within time—*Srinivasa v. Rangasami*, 31 Mad. 452.

487. Suit on breach of covenant in lease :—A suit to recover damages for breach of covenant of a lease (declared by the provision of sec. 108, Transfer of Property Act), the terms of which were embodied in a registered *pattah*, is governed by this Article—*Girish v Kunjo*, 35 Cal. 683 (687); *Nabin Chandra v. Munshi Mandar*, 6 Pat. 606, 101 I.C. 707, A.I.R. 1927 Pat 248.

A suit for damages by the lessee against the lessor for failure on the part of the latter to put the former in possession of the leased premises, the lease being registered, is governed by Art. 116—*Zamindar of Vizianagram v. Behara*, 25 Mad. 587 (596); *Obedur Rahman v. Darbari*, 7 Lah. 423, A.I.R. 1927 Lah. 1, 98 I.C. 584, 27 P.L.R. 663.

488. Other suits :—

Suit for rent under registered kabuliati.—See Note 467 under Art. 110.

Suit for rent under registered kabuliati under Bengal Tenancy Act.—See Note 468 under Art. 110.

Suit against agent under registered contract.—See Note 413 under Article 89.

Suit on registered ekrar.—A suit upon a registered *ekrar* executed by the priest of an idol, for recovery of arrears of maintenance is governed by this Article—*Girijanund v. Sailajanund*, 23 Cal. 645.

Suit based on registered award:—The word 'contract' in this Article does not include an award. Consequently a suit to recover money payable under an award does not fall under Article 116, but under Art. 120—*Samjmal v. Tolomal*, 6 S.L.R. 148, 19 I.C. 376 (377). See also *Sukho Bibi v. Ram Sukh*, 5 All. 263 and *Raghubar v. Madan*, 16 All. 3, where the award was registered, but Art. 116 was not applied.

Suit on deed of release:—A suit for recovery of certain moveable property (books) under a registered deed of release, executed by the defendant in favour of the plaintiff, in which the defendant acknowledged the books to belong to the plaintiff, fell under this Article—*Rama Nath v. Mohesh*, 9 C.W.N. 679.

Suit for account against partner:—A suit for account by one partner against another after dissolution of partnership is governed by Art. 106 and not by this Article, even though the deed of partnership is registered—*Vairavan v. Ponnayya*, 22 Mad. 14. This Article cannot be stretched to cover every case in which the plaintiff's claim may in its origin be referred to a contractual relation which is expressed in a registered agreement—*Ibid*.

Suit on account stated:—Where a registered partnership contract binds the parties to pay the loss according to their respective shares, a suit to recover the defendant's share of the loss, on a settlement of accounts between the plaintiff and the defendants, is not governed by Article 64 (nor by Art. 106) but by Article 116—*Ranga Reddi v. Chinna Reddi*, 14 Mad. 465.

Suit by surety.—Where the surety is liable under a registered contract, the limitation is six years under Article 116—*Laloo Singh v. Sunderabai*, A.I.R. 1926 Nag. 449, 95 I.C. 707.

489. Contract signed by one party.—A contract (lease) which has been registered, is to be treated as a contract in writing registered, notwithstanding that it bears the signature of only one of the parties (viz. the tenant only). There is no statutory provision requiring the signature of both parties—*Girish v. Kunja*, 35 Cal. 683 (688); *Ambalavana v. Vaguran*, 19 Mad. 52, *Kotappa v. Vallur Zamindar*, 25 Mad. 50; *Zamindar of Vizianagram v. Behara*, 25 Mad. 587; *Chellaphroo v. Banga Behari*, 20 C.W.N. 408, 31 I.C. 394; *Parbati v. Sarup*, 50 All. 661, A.I.R. 1928 All. 313 (315), 109 I.C. 409. The Bombay High Court holds *contra* in *Apaji v. Nilkantha*, 3 Bom.L.R. 667. Under sec. 107 of the Transfer of Property Act (as amended in 1929), if a registered lease is contained in two instruments, each such instrument must be *executed by both the lessor and the lessee*.

490. Limitation.—Limitation runs from the date when the contract is broken, or when there are successive breaches, from the date when the breach in respect of which the suit is instituted occurs, or when the breach is continuing, from the date when it ceases—*Ram Narain v. Adindra*, 17 C.W.N. 369, 13 I.C. 440, 15 C.L.J. 17. Upon failure to pay the money due on a bond, there is but one breach of the contract, viz. the non-payment on the date agreed upon; and there is no

question of continuing or successive breaches during the time the money remains unpaid—*Bhagwant v. Daryao*, 11 All. 416 (423); *Mansab v. Gulab*, 10 All. 85; *Golam v. Mahomed*, 19 Cal. 23 (Note); *Gudri v. Bhubaneswari*, 19 Cal. 19 (25). See also 34 All. 429 cited in Note 478 under Art. 115

A sale-deed was executed in favour of the plaintiffs in 1901 purporting to convey the property free from incumbrances and containing a covenant that should any excess sum be charged against the purchasers, the other properties of the vendor would be liable for the same together with interest and costs. At the time of the sale there was a prior simple mortgage existing on the property, and the mortgagee brought a suit for sale in 1912 which was decreed in 1914. But before sale, the plaintiffs paid off the decrees in May 1915, and in July 1915 brought the present suit for recovery of the amount which they had paid on account of the mortgage together with interest. It was held that the suit was not barred, as the cause of action arose on the date on which the plaintiffs suffered actual loss (May 1915) by reason of being compelled to pay off the decree on the prior mortgage—*Ram Dulari v. Hardwari*, 40 All. 605 (609).

A mortgage was executed in 1899 and part of the consideration money was left with the mortgagee to pay off a prior mortgage, it being agreed that any interest which might accrue on this sum in future would be entirely upon his shoulders. The mortgagee neglected to pay, in consequence of which the prior mortgagee sued and brought the mortgaged property to sale in 1912, and to avert that sale the mortgagor paid off the amount, and then brought the present suit in 1916 to recover damages from the mortgagee. Held that in as much as the mortgagee had undertaken all responsibility for further interest and could therefore pay the prior mortgage at any time, the cause of action did not accrue on the date of the mortgage in 1899, but arose when the mortgagor was actually damaged in 1912—*Ishri Prasad v. Muhammad Sami*, 19 A.L.J. 81, 60 I.C. 829, A.I.R. 1922 All. 133. Similarly, where the purchaser agreed to pay out of the purchase-money a certain sum due to the vendor's creditor, but no time was fixed for making the payment to the creditors, and the purchaser undertook all future liability for interest, and the purchaser not having made the payment the vendor himself had to pay his creditors, and the vendor brought a suit against the purchaser for recovery of the amount, held that time ran not from the execution of the sale-deed, but from the date when the vendor paid off his creditors—*Ram Rachhya v. Raghunath*, 8 Pat 860, A.I.R. 1930 Pat. 46 (52), 122 I.C. 244

In *Raghubir v. Jaij Raj*, 34 All. 429 (see the facts of this case stated in Note 485 ante) where the plaintiffs did not suffer any loss (i.e., did not pay any money under the mortgage-decree) and no time was fixed for payment of the mortgage-money by the vendees to the mortgagee of the vendors, it was held that limitation ran from the date of execution of the sale-deed. It was further held that the obtainment of the decree by the mortgagee against the vendors did not give them a fresh starting point

for limitation. The Judge further remarked that even if the vendors had paid any money to their mortgagee under the mortgage-decree, it was doubtful whether that would have furnished a fresh cause of action to them. This decision follows the English case of *Battley v. Faulkner*, (1820) 3 B. & Ald. 288, 22 R.R. 390, where it is laid down that one breach of contract can only furnish one cause of action, and that any consequential damage arising from the breach gives no new cause of action.

117.—Upon a foreign Six The date of the judgment as defined years. judgment in the Code of Civil Procedure, 1908.

Foreign judgment.—See sec 2 (6), C. P. Code

490A. The period of limitation for a suit to enforce an *ex parte* decree obtained in a Native State runs from the date of the *ex parte* decree, and the plaintiff is not entitled to deduct the time during which the defendants were applying before the Chief Judge of that State to set aside the *ex parte* decree, for until it is in fact set aside it remains a final decree capable of being enforced. Moreover, sec. 14 does not apply to proceedings taken in foreign Courts—*Hari Singh v. Muhammad Said*, 8 Lah. 54, 102 I.C. 523, A.I.R. 1927 Lah 200 The right to sue on a foreign judgment is barred after six years from the date of the judgment, and the time spent in executing the decree in the foreign country cannot be excluded—*Hecra Monee v. Promotho*, 8 W R 32

118.—To obtain a Six When the alleged adoption declaration that an years. tion becomes known alleged adoption is to the plaintiff. invalid, or never, in fact, took place.

490B. "Invalid":—In some earlier Punjab cases it was held that a distinction should be drawn between a case where an adoption is wholly unauthorised and is therefore an *absolute nullity*, incapable of creating any jurat relation between the adopter and the adoptee, and a case where the act is done with authority but in an improper exercise of that authority and it is in the latter sense that the word 'invalid' in Article 118 should be construed. Therefore this Article is inapplicable to a case of void adoption (as for instance where the widow adopted without any authority from her husband)—*Karam Dad v Nathu*, 86 P.R. 1905 (F.B.); *Bhagat Ram v Tulsī Ram*, 144 P R 1892, *Muhammad Din v. Sardar Din*, 67 P.R. 1901. These rulings were doubted in a later case of the same Chief Court where it was held that Article 118 applied to every case where the validity of the adoption was the substantial question in issue, and the fact that it was alleged to be invalid or was inherently invalid made no difference in the matter—*Md. Niazuddin v. Md. Umar Khan*, 1 P.R. 1907. The ruling in 86 P.R. 1905 (F.B.)

has also been disapproved of in *Nathu v. Rahaman*, 44 P.R. 1911, 11 I.C. 11.

491. Suit for possession :—

*Under the Act of 1871 :—*Article 129 of the Act IX of 1871, which corresponds to the present Article, ran thus: "Suit to...set aside an adoption—Twelve years—The date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father." The question arose whether the Article applied to a suit for possession. It was held by the Privy Council that where the plaintiff could not succeed without displacing an apparent adoption by virtue of which the opposite party was in possession, a suit by the plaintiff for possession fell under that Article. The expression 'set aside an adoption' in Article 129 applied indiscriminately to suits for possession and to suits of a declaratory nature, and it did not denote solely a suit of the latter description—*Jagadamba v. Dakhina Mohan*, 13 Cal. 308 (P.C.); *Mohesh v. Taruck*, 20 Cal. 487 (P.C.). It should be noted in this connection that the Privy Council case of *Raj Bahadoor v. Achumbit*, 6 C.L.R. 12 (in which it was held that Article 129 of the Act of 1871 did not apply to a suit for possession, and which gave rise to a good deal of misconception in Indian Courts) was not a suit to set aside an adoption but was a suit brought by a reversioner for possession and for cancellation of a deed which purported to give an absolute interest to the widow, and the defendant in the suit claimed under an adoption which was one to the widow herself and not to her husband, the Privy Council held that the adoption being void, the plaintiff was entitled to claim possession, ignoring the adoption. These decisions under the old law should not be accepted as of any authority under the present Act.

Article 129 of Act IX of 1871 applied to all suits in which the plaintiff could not succeed without displacing an apparent adoption by virtue of which the defendant was in possession. That Article prescribed 12 years as the period of time within which a suit to establish or set aside an adoption might be brought, and that such period of twelve years should begin to run from the date of adoption, or (at the option of the plaintiff) from the date of the adoptive father's death. Therefore, where no suit was brought by the reversioners to set aside an adoption made by a Hindu widow, within 12 years from the date of adoption, the reversioners were not entitled to bring any further suit after the widow's death to recover the property from the defendants who were in possession by virtue of the adoption, because Act IX of 1871 did not give to a reversioner whose right to sue for possession accrued upon the death of a Hindu widow, any further time than the 12 years given by Article 129 to any plaintiff. Although under Article 141 of the Act of 1877 the reversioner might bring a suit for possession within 12 years from the death of the widow, still if the period of limitation prescribed by the Act of 1871 had already expired before the Act of 1877 came into force, it could not be revived by the latter Act—*Vaithialinga v. Srirangath*, 48 Mad. 883 (P.C.), 49 M.L.J. 769, 30 C.W.N. 313, 92 I.C.

85, A.I.R. 1925 P.C. 249. This ruling is of no importance under the present Act.

Under the Acts of 1877 and 1908 :—It will be seen that the language of the Article under the present Act (which is the same as in the Act of 1877) is entirely different from the language of the Article in the Act of 1871; the period of limitation, the date from which it runs, and the description of the nature of the suit have all been changed, and the question is whether the alteration of the language denotes a change of law; in other words, whether the present Article will apply to a suit for possession.

In a large number of cases of the several High Courts, it has been held that by departing from the language of Art. 129 of Act IX of 1871 and by using a language in Art. 118 of the Act of 1877 which can only refer to a suit for *declaration* it is intended that this Article should apply only to suits where such *bare declarations* are sought for; it does not apply to a suit for *possession* of property, even though it may be necessary in such a suit to decide that a given adoption is invalid—*Natthu Singh v. Gulab Singh*, 17 All. 167 (171); *Basdeo v. Gopal*, 8 All. 644 (646); *Radha Dulaiya v. Rashik Lal*, 45 All. 1 (4) (distinguishing *Chunni Lal v. Sita Ram*, 34 All. 8), *Baikanta v. Kali Charan*, 9 C.W.N. 222 (224), *Ram Chandra v. Ranjit*, 27 Cal. 242 (254); *Lala Parbhu v. Mylne*, 14 Cal. 401 (417); *Valaga Mangamma v. Bandlamudi*, 30 Mad. 308, *Maharaja of Kolhapuri v. Sundaram*, 48 Mad. 1; *Rama Rao v. Venkola*, 17 M.L.J. 282; *Kalandavelu v. Arumugatha*, 18 I.C. 493, *Bhagabat v. Murari*, 15 C.L.J. 97, *Hiralal v. Bai Rewa*, 21 Bom. 376, *Doddawa v. Yellana*, 46 Bom. 776 (F.B.); *Shah Deo Narain v. Kusum Kumari*, 5 P.L.J. 164, *Surjan Singh v. Kharak Singh*, 96 P.R. 1908; *Nathu v. Rahman*, 44 P.R. 1911, 11 I.C. 11, *Wazir v. Tattu*, 96 P.R. 1893, *Jhola v. Khazana*, 8 Lah. 48, A.I.R. 1926 Lah. 654. This view of law has been approved of in *Tribhuwan v. Rameswar*, 28 All. 727 (P.C.) and *Md. Umar v. Md. Niazuddin*, 39 Cal. 418 (P.C.), and has now been confirmed by the decision of the Judicial Committee in the recent case of *Kalyandappa v. Chanbasappa*, 48 Bom. 411 (P.C.), 26 Bom. L.R. 509, 28 C.W.N. 666, 22 A.L.J. 508, 46 M.L.J. 598 where their Lordships have distinctly laid down (at pp. 426, 427) that the language of Article 118 of the Acts of 1877 and 1908 is different from the language of Art. 129 of the Act of 1871, that the words 'a suit to obtain a declaration' are terms of art and refer to suits under sec. 42 of the Specific Relief Act for a declaratory decree that an adoption is invalid or did not take place, and that the Article applicable to a suit for *possession* of immoveable property on the death of a Hindu female is Article 141, even if it is necessary to decide in that suit whether an adoption is or is not valid.

But it has been held by some cases of the Bombay and Madras High Courts and the Punjab Chief Court that the altered language has made no difference in the law of limitation, that the present Article applies to every suit for possession in which the validity of the adoption is the substantial question in dispute, whether such a question is raised by the

plaintiff in the first instance, or arises in consequence of the defendant setting up his own adoption as a bar to the plaintiff's success—*Srinivas v. Hanmant*, 24 Bom. 260 F.B. (overruling *Fannyamma v. Manjanna*, 21 Bom. 159); *Shrinivas v. Balvant*, 37 Bom. 513, 15 Bom.L.R. 533; and that this Article *does* apply to a suit for possession of immoveable property where it is necessary to challenge the validity of an adoption before a right to such property can be established—*Barot Naran v. Barot Jessang*, 25 Bom. 26; *Chanbasappa v. Kaliandappa*, 41 Bom. 728; *Parvati v. Saminatha*, 20 Mad. 40; *Gujar Singh v. Puran*, 71 P.R. 1901; *Bhupa v. Nigahia*, 68 P.R. 1903, *Ganesha v. Nathu*, 20 P.R. 1902; *Ishar v. Partap Singh*, 38 P.R. 1907, *Muhammad Niazuddin v. Muhammad Umar*, 1 P.R. 1907. But all these decisions are opposed to the view taken in the recent Privy Council case of *Kalyandappa v. Chanbasappa*, 48 Bom. 411, cited above, and are no longer of any authority.

Where a suit by the reversioners for recovery of possession of property had become barred in 1874 under Article 129 of the Limitation Act of 1871, and a title to such property had been acquired by the heirs of the adopted son under sec. 28 of that Act, it could not be affected by the provisions of the later Limitation Acts of 1877 or 1908—*Somasundaram v. Vaithilinga*, 40 Mad. 846 (867); affirmed, 48 Mad. 833 (P.C.).

This Article does not apply where the adoption is made by the widow not to her deceased husband, but to *herself*. Such adoption does not confer any title on the adopted son, and it is not necessary for the reversioner to sue for a declaration of the invalidity of such adoption. He can bring a suit for possession, ignoring the adoption, and such suit does not fall under this Article—*Lachman v. Kanhaiya*, 22 Cal. 609 (614) (P.C.).

Where the suit is expressly framed as a suit to set aside an adoption and not as a suit for possession, Article 118 applies and not Article 141 or 144—*Ayyadorai v. Solai Ammal*, 24 Mad. 403 (408).

Adoption challenged on the ground of forgery of anumati-patra:—See *Harri Bhushan v. Upendralal*, 24 Cal. 1 (P.C.) cited under Art. 92.

Suit by natural-born son:—A suit brought by the natural-born son (who was born 2 or 3 years after the adoption), during his minority, for a declaration that the adoption made by his father is invalid, and for an injunction restraining the defendant (adopted son) from interfering with the enjoyment of the property belonging to the plaintiff, does not fall under this Article, as the injunction is the main relief sought for and the prayer for declaration is merely auxiliary. Moreover, under Article 118, the period of limitation runs from the time when the alleged adoption becomes known to the plaintiff, but in this case the plaintiff, being a minor, could not be fixed with the knowledge of the adoption from the date of his birth. Hence this Article cannot apply during his minority—*Sidda Reddi v. Deva Jayarami*, 51 M.L.J. 557, A.L.R. 1926 Mad. 1123, 98 I.C. 435.

492. Limitation:—The cause of action arises from the date on which the adoption became known to the plaintiff, and not from the date of the death of the adoptive father—*Ram Chandra v. Narayan*, 27 Bom.

614; *Shrinivas v. Balvant*, 37 Bom. 513; *Ganga Sahai v. Lekhraj*, 9 All. 253 (269). Where the fact that a claim was being made on the basis of an alleged adoption was known to the plaintiff more than six years before the suit was instituted, and he himself had attained majority nearly nine years before the suit was commenced, held that it was barred under this Article—*Lala Jagmohan v. Deokinandan*, 32 C.W.N. 153 (P.C.), A.I.R. 1927 P.C. 229, 29 Bom. L.R. 1386, 4 O.W.N. 832, 53 M.L.J. 301, 106 I.C. 488. Limitation runs when the adoption becomes known to the plaintiff, and the defendant should prove clearly that the suit is barred by reason of the plaintiff having knowledge of the adoption more than six years before the date of institution of the suit. The fact that the adoption deed was registered does not lead to the presumption that the plaintiff must have had knowledge of the adoption from the date of registration of the adoption deed, as registration is not tantamount to notice, and the plaintiff cannot be expected to go on searching the register from time to time to see whether any registered deed affecting his rights has been executed—*Gulam Muhammad v. Mirza*, 5 Lah. 368, A.I.R. 1925 Lah. 25, 84 I.C. 174.

Where the plaintiff executed a deed of adoption in which he declared that he had adopted a certain boy, and afterwards he brought a suit for a declaration that the adoption deed was void and that the adoption had in fact never taken place, the period of limitation for the suit ran from the date of the adoption deed—*Udit Narain v. Randhir*, 45 All. 169 (176), 69 I.C. 971, A.I.R. 1923 All. 58.

Where the reversioners of a deceased Hindu allow a suit for a declaration of the invalidity of an adoption to become barred by time under this Article, they are not entitled to sue for a declaration that a subsequent gift to the adopted son is not binding upon them, because that gift does not give them a fresh cause of action, in that it does not involve any further denial of the rights of the reversioners than was involved in setting up the adoption in the first place—*Khushal Singh v. Kanda*, 5 Lah. L.J. 63, 56 I.C. 931, A.I.R. 1921 Lah. 389. See also *Semba Parayan v. Maral*, 52 M.L.J. 711, A.I.R. 1927 Mad. 674, 102 I.C. 885, where a contrary view has been taken, under the peculiar circumstances of the case.

Quære.—In case of an adoption by a widow, if the nearest reversioner dies before the expiry of the period of limitation (6 years) for a suit to set aside the adoption, and the next reversioner, who was a minor at the date of adoption, brings a suit to set aside the adoption within three years after attaining majority (sec. 8), is the suit barred by limitation? This question was referred to a Full Bench, but not decided, as the decision was unnecessary in view of the fact that the adoption was found to be valid—*Annapurnamma v. Appayya*, 52 Mad. 620 (F.B.), 56 M.L.J. 760, 119 I.C. 389, A.I.R. 1929 Mad. 577.

493. Effect of limitation—When an adoption is made by a Hindu widow without authority, it is the duty of the immediate reversioner to bring a suit for declaration within the period prescribed by

this Article; and if the immediate reversioner fails to bring a suit within that period, the remote reversioner will also be barred—*Ayyadorai v. Solai Ammal*, 24 Mad. 405 (407); *Chiruvolu v. Chiruvolu*, 29 Mad. 390, 393, 411 (F.B.); *Venkatasivayya v. Polcpeddi Adenna*, 44 Mad. 218, 39 M.L.J. 621, A.I.R. 1921 Mad 380, 60 I.C. 98. There is a distinction between a suit to set aside an alienation and a suit to set aside an adoption. In suits to set aside alienations by a qualified owner, the immediate reversioner cannot be held to represent the remote reversioners, but in suits to set aside an adoption, the immediate reversioner ought on principle to be held to represent the remote reversioner, so that if the immediate reversioner is barred, the remote reversioner is likewise barred. The right of each and every reversioner to set aside the adoption cannot be viewed as altogether personal to him—*Chiruvolu v. Chiruvolu*, 29 Mad 390 (393, 411) F.B. The word 'plaintiff' in col 3 includes a person from or through whom the plaintiff derives his right to sue; therefore, if the nearest reversioner (e.g. daughter) is barred, a remote reversioner (e.g. daughter's son) claiming through the nearest reversioner is also barred—*Ayyadorai v. Solai Ammal*, (supra). The Privy Council has also laid down in *Venkatanarayana v. Subbammal*, 38 Mad. 406, 42 I.A. 125, that a suit by a presumptive reversioner for a declaration that an adoption is invalid is one brought in a representative capacity on behalf of all the reversioners.

If the suit for a declaration that the adoption is invalid is barred by time, the plaintiff cannot elude the operation of Art. 118 by suing for a declaration that a gift made by the adoptive female in favour of the adopted son should not bind the plaintiff—*Bhoop Singh v. Ramji*, 31 P.L.R. 222, 121 I.C. 296, A.L.R. 1930 Lah. 438 (439).

But lapse of time does not operate to give validity to an invalid adoption, and if no suit is brought by the reversionary heir within six years to obtain a declaration that the adoption is invalid, the possession by the alleged adopted son for more than 12 years during the lifetime of the widow will not be adverse to the reversioner, who therefore will not be prevented from bringing a suit for possession under Arts 140 and 141 within twelve years from the date when the widow dies or when the estate falls into possession. The adoption by the widow does not impose upon the reversioner the necessity of filing a suit to have it declared invalid during the lifetime of the widow, under pain of losing the inheritance upon the widow's death—*Hari Lal v. Bai Rewa*, 21 Bom. 378 (379); *Basdeo v. Gopal*, 8 All. 644 (646), *Nathu Singh v. Gulab*, 17 All 167 (171); *Lala Parbhu v. Mylne*, 14 Cal. 401 (417); *Muhammad Umar v. Muhammad Niazuddin*, 39 Cal. 418 (432) (P.C.); *Kalyandappa v. Chanbasappa*, 48 Bom. 411 (426), P.C.; *Bhagwat v. Murari*, 15 C.W.N. 524, 7 I.C. 427, 15 C.L.J. 97, *Bapayya v. Akamma*, 36 I.C. 355 (Mad.); *Rangan v. Mahbub*, 55 P.R. 1897.

119.—To obtain a de- Six When the rights of the
 claracion that an years. adopted son, as such,
 adoption is valid. are interfered with.

494. Suit for declaration, not for possession:—

This Article, like the previous one, applies only to a suit for a bare declaration as to the validity of an adoption. It does not apply to a suit for possession, even though the plaintiff may have to establish the validity of the adoption as the basis of his claim to possession—*Jagannath v. Runjit*, 25 Cal. 354 (359), *Chandania v. Sallig*, 26 All. 40 (48), *Lall v. Murlidhar*, 24 All. 195, *Padajirav v. Ramrav*, 13 Bom. 160 (165); *Arjan Singh v. Lachhman Singh*, 81 P.R. 1914 (F.B.), 25 I.C. 429 (overruling *Ram Narain v. Maharaj Narain*, 3 P.R. 1904), *Ratnasami v. Akilandammal*, 26 Mad. 291 (per Bhashyam Ayyanger J.)

But it has been held in a Madras case that where a plaintiff cannot obtain a decree for possession without a decision that an adoption is valid, the suit for possession is governed by Art. 119—*Ratnasaras v. Akilandammal*, 26 Mad. 291, (per Moore and Benson J.) ; Bhashyam Ayyanger J. dissenting).

A suit by an adopted son for a declaration that a decree which was passed on the basis that there was no adoption is not binding on him, is virtually a suit for a declaration that his adoption is valid, under this Article, because the plaintiff cannot get the declaration he asks for, without establishing the validity of his adoption. The suit cannot be treated as one for possession governed by the 12 years' rule—*Bharma v. Balaram*, 43 Bom. 63 (65).

495. Factum and validity of adoption:—This Article applies to all suits, in which either the factum or the validity of the adoption is denied; and the plaintiff will have to prove the factum as well as the validity of the adoption, i.e., he must show, not only that the adoption *in fact* took place, but also that the adoption is *valid*—*Laxmana v. Ramapa*, 32 Bom. 7 (dissenting from *Ningava v. Ramappa*, 28 Bom. 94, and *Shivram v. Krishnabai*, 31 Bom. 80, in which it was held that this Article was restricted to suits in which the question was not as to the factum but as to the validity of the adoption). "Unlike Art. 118, Art. 119 does not separately provide for a suit to obtain a declaration that an adoption *in fact* took place, for the simple reason that the mere factum of adoption will not entitle one to a legal character unless the adoption is also *valid*. A plaintiff therefore will have to sue for a declaration that his adoption is valid, whether the factum itself is denied by the defendant or the factum is admitted but the validity is challenged."—Per Bhashyam Ayyanger J. in *Ratnasaras v. Akilandammal*, 26 Mad. 291

496. Interference —The interference mentioned in the third column of this Article is an interference which must amount to an absolute denial of the status of adoption, and an unconditional exclusion from the enjoyment of rights in virtue of that status. This Article can have no application where the interference was of no greater effect than that of merely postponing the right of the adopted son to succeed to the property of his adoptive father—*Ningava v. Ramappa*, 28 Bom. 94 (101), *Maung Gyi v. Maung Gaing*, 1 Rang. 186, 74 I.C. 970.

The interference need not necessarily be in relation to the very property sought to be recovered in the suit; an interference in relation to property other than that sued for would set time running—*Akilandammal v Ratnamasari*, 13 M.L.J. 145.

The interference contemplated by this Article is an interference caused by the defendant in the suit, and not an interference by some third party who was in no way connected with the defendant (e.g., an interference by the adoptive father of the plaintiff)—*Chandania v. Salig*, 26 All. 40 (49)

Alienation, by means of a gift by the adoptive mother in favour of the daughter, is an interference with the rights of the adopted son—*Ponnamal v. Ratnamasari*, 13 M.L.J. 144.

120.—Suit for which Six When the right to sue no period of limitation is provided elsewhere in this Schedule.

497. This is called the 'omnibus' Article of the Limitation Act.

This Article is final and residuary, and the Court ought not to regard a case as coming under this Article unless clearly satisfied that it does not come under any of the other Articles dealing with specific cases—*Lala Gobind v Chairman* 6 C.L.J. 535, *Sharoop v. Joggeshur*, 26 Cal. 564 (F.B.), *Mahomed Wahib v Mahomed Ameer*, 32 Cal 527; *Ardikappa v Kondappa*, 9 Bur L T 130, *Churan Lal v. Shib Lal*, A.I.R 1926 Lah 242, 92 I.C. 994

498. DECLARATORY SUITS:—

A suit by the purchasers of certain land who have obtained possession of the land, for a declaration of their right to have the land registered in their name in the revenue records, is governed by this Article, not by Art 144—*Bhikaji v. Pandu*, 19 Bom 43 (45) A suit for a declaration that the defendant whose name appeared as lessee in a lease-deed had no interest in the lease and that he was only a benamidar for the plaintiff, is not one to cancel or set aside the instrument of lease under Art. 91, but one to which Art. 120 applies, and the cause of action accrues when the plaintiff's position as lessee is challenged—*Basant v. Chiddammi*, 35 All. 149. (See this case cited under Article 91)

The plaintiff alleged that he was the proprietor of certain land which one of the defendants had wrongfully mortgaged to the others, and prayed that, the mortgage-deed being set aside, the land might be protected from illegal foreclosure by cancelment of the foreclosure proceedings which had been instituted by the mortgagee. It was held that this was not a suit strictly for cancelling or setting aside the instrument of mortgage to which Art. 91 applied, but was rather a suit for a declaratory decree and governed by this Article—*Sobha v. Sahodra*, 5 All 322. So also,

where the plaintiff sued for maintenance of possession in a certain joint-family property by cancelment, so far as his interest was concerned, of a certain deed of sale by which another co-parcener in the same property had purported to convey the whole to a stranger, it was held that the limitation applicable to such a suit was that prescribed by this Article and not that prescribed by Art. 91—*Din Dial v. Hur Narain*, 16 All 73 A land belonging to defendant No. 1 was mortgaged by him to defendant No. 5, and afterwards the plaintiff purchased it at a sale in execution of a certain decree against defendant No. 1, the plaintiff thereupon brought a suit for a declaration that the mortgage was fraudulent and without consideration. Held that the suit fell under Article 120 and not under Article 91—*Pachmuthu v. Chinnappan*, 10 Mad 213 (See these cases cited under Art. 91).

A suit for a declaration that a decree purchased in the name of the defendant who had wrongfully taken out execution of the same, had been really purchased by the plaintiff for his own benefit, and that the defendant was merely a benamidar, is not a suit for relief on the ground of fraud under Art. 95 (as no question of fraud arises in the case) but is governed by this Article—*Gour Mohun v. Dinonath*, 25 Cal 49 (51) A suit for a declaration that a decree passed against the plaintiff is invalid on the ground that it was passed against him when he was a minor, and that the guardian ad litem was grossly negligent in not properly defending the suit in which the decree was passed, falls under this Article and time runs not from the date of the decree but from the time when the gross negligence of the guardian became known to the plaintiff—*Basavayya v. Bapana*, 58 M L J 349, A I R. 1930 Mad 173 (174), 120 I C. 880 A suit by the heir of the founder of a *wakf* for a declaration that an alienation of *wakf* properties by the *mutivalli* is void, brought during the lifetime of the alienor, is governed by this Article, and must be brought within six years from the date of the alienation—*Maulavi Muhammad Fahimul Haq v. Jagat Ballabh*, 2 Pat. 391, 4 P L T 675, A I R. 1923 Pat 475 A suit for a declaration that an alienation of trust property is invalid and not binding on the trust falls under this Article and not under Article 134 which applies to a suit for recovery of possession of trust properties Time runs from the date of execution of the sale-deed and not from the time when the plaintiff comes to know of the transfer—*Venkatachella v. Collector*, 38 Mad 1064 (1070).

A suit for a declaration that an alienation made by the karnavan of a tarward property is not binding on the tarwad, is governed by Art 120 Time runs from the date of the alienation, and not when the plaintiff obtains knowledge of the alienation—*Ottapurakal Thazhath v. Pallikal*, 33 Mad. 31 (33). A suit by the plaintiffs to follow the estate of their debtor in the hands of the defendant and for a declaration that a mortgage executed by the debtor in favour of the defendant is void as against the creditors of the debtor, is governed by this Article and not by section 10—*Greender v. Mackintosh*, 4 Cal. 897 A suit by a Mahomedan widow against the brother of her deceased husband for a declaration of her

right to inherit and possess the entire estate of her husband (in accordance with a proved local custom) falls under this Article: it is not a suit for a distributive share of property within the meaning of Art. 123—*Mahomed Riasat v. Hasin Banu*, 21 Cal. 157, (163) (P.C.).

In a suit for ejectment in a Court of Revenue against H, he pleaded that he was entitled to remain in possession under a certain *zur-i-peshgi* lease, the term of which had not yet expired. The Court of Revenue treated the question thus raised as falling under sec. 199 of the Agra Tenancy Act 1901 and directed H to file a suit in the Civil Court within three months to vindicate his right. H instituted the suit in the Civil Court after more than three months. *Held* that sec. 199 was not applicable and H was not bound to file his suit in the Civil Court within three months from the date of the order of the Court of Revenue. This was a suit for a declaration, and could be brought within six years of the accrual of the cause of action—*Suraj v. Hira*, 37 All. 94 (96).

Where the suit was in substance a suit for a declaration of the proprietary title of the plaintiff to the land claimed, as well as for correction of the settlement Record, *held* that the plaintiff was entitled to a declaration of his proprietary right, even if his right to demand a correction of the settlement record was lost by lapse of time; *held* also that Art. 96 was not applicable to the suit but Art. 120—*Taja v. Gulam*, 35 P.R. 1880; *Nathu v. Buta*, 27 P.R. 1881.

499. Declaration of possession and title :—A suit for a declaration of title to, and of possession in, immoveable property of which the plaintiff is in possession, is governed by this Article and not by Article 144—*Rajani v. Monaram*, 23 C.W.N. 883, 53 I.C. 968; *Legge v. Rambaran*, 20 All. 35 (F.B.). In the Full Bench case their Lordships said (at p. 36)—“There is the widest possible difference between a suit for a declaration such as is asked for in this suit, and a suit for actual possession of immoveable property. In a suit to which Art. 144 would apply, there must be a prayer, express or implied, for the dispossession of some one from the property or from the interest in it which the suit claims. In the present suit the plaintiffs have most distinctly asserted that they are and have all along been in possession of the property. There is no one to be dispossessed from it or from any interest in it. All that they want to be removed is a cloud, which was cast upon their title.” See also *Mahabharat v. Abdul Hamid*, 1 C.L.J. 73.

Where the Zemindars brought a suit against the patnidars for a declaration that they were entitled to and were in possession of the underground rights in a certain mouza, and the suit was brought more than 12 years after the patnidars had worked on the minerals on a large scale, *held* that the suit, taken as a declaratory one, was barred as more than 6 years had elapsed since the right to sue for the declaration accrued, and viewed as a possessory suit, the suit was also barred under Article 144—*Satya Niranjan v. Ram Lal*, 4 Pat. 244 (P.C.), 6 P.L.T. 42, A.I.R. 1925 P.C. 42, 86 I.C. 289.

An order under the Land Registration Act refusing to register the applicant's name does not amount to a dispossession of the applicant, and delivery of possession to the opposite party. When therefore the applicant continues in possession, no suit for recovery of possession lies at his instance, and a suit to have his title declared is governed by Art. 120—*Chowdhury Shamanund v. Rajnarain*, 11 C.W.N. 186; *Kali v. Bhagaban*, 1 I.C. 810. Even though in the suit for declaration there be a prayer to set aside the order of the Revenue Officer, the suit will still be governed by this Article, and not by Art. 14, because such prayer is merely a surplusage, as the civil Court has no power to set aside an order passed under the Land Registration Act—*Luchmon v. Kanchun*, 10 Cal. 525 (527).

Attachment by Magistrate :—A suit for declaration of title to property attached by the Magistrate under section 146 Cr. P. C. falls under this Article—*Rajah of Venkatagiri v. Isakapali*, 26 Mad 410 (415), and a fresh period of limitation under section 23 begins to run at every moment of the time during which the attachment continues—*Brojendra v. Sarojini*, 20 C.W.N. 481, 22 C.L.J. 283, 31 I.C. 242, *Panna Lal v. Panchu*, 49 Cal 544, 26 C.W.N. 432, 65 I.C. 200. But see *Yeknath v. Bahua*, 20 N.L.R. 195, A.I.R. 1925 Nag 236, and *Raja of Venkatagiri v. Isakapali*, (supra) where it was held that the period of limitation ran from the date of attachment, and that there was no continuing wrong.

Declaration that forfeiture is illegal :—A suit for a declaration that an order of forfeiture under section 153 of the Bombay Land Revenue Code (Act V of 1879) is illegal, is governed by this Article—*Samaldas v. Secretary of State*, 16 Bom 455.

Declaration of periodically recurring right :—A suit not only to establish a periodically recurring right (*viz.*, a right to receive malikana annually pure and simple), but also to establish a right to the property itself, is governed by Article 120, not by Art. 131—*Gopi Nath v. Bhugwat*, 10 Cal. 697 (708).

Declaration of heirship :—A suit for a declaration that the plaintiff was the daughter and heiress of the last vatandar would be governed by this Article, and the plaintiff's cause of action accrues not on the death of her predecessor but on the denial of her status by the defendant—*Tulabai v. Vinayak*, 15 Bom 422.

Declaration of invalidity of marriage :—A suit by a Parsi woman for a declaration of the invalidity of her marriage celebrated in her infancy is governed by this Article, and limitation runs from the date of her attaining majority—*Bai Shirinbai v. Kharshedji*, 22 Bom 430.

500. Suit by reversioners :—A suit by the reversionary heirs of a *stanom* for a declaration that a *kanom*, executed by the person in possession of the *stanom* in favour of the defendant, is not binding on the plaintiffs or on the *stanom*, is governed by this Article, and not by Art. 91—*Puraken v. Parvathi*, 16 Mad. 138 (139).

Where a fraudulent decree is passed against a person in possession with a limited interest, the reversioner is not bound to sue for a declaration of the invalidity of the decree. It is open to him to wait until the succession falls in, and if anything is done thereafter constituting an actual injury to his vested right, then to pursue his remedy. Therefore, where a fraudulent and collusive decree was passed against the widow, and after the widow's death, the decree-holder sought to execute the decree by proceeding to attach the property in the hands of the reversioner (plaintiff), who thereupon sued for a declaration of the invalidity of the attachment, held that the suit was governed by Article 120, and was in time if brought within six years from the date of attachment of property in execution of the fraudulent decree, though more than six years after the passing of the decree itself, because the injury in respect of which it was necessary for the plaintiff to obtain redress was the attachment and not the passing of the decree—*Tallapragada v. Boorugapalli*, 30 Mad 402 (404, 405), dissenting from *Parekh v. Bai Vakhat*, 11 Bom 119.

A suit by the reversioner for declaration of his title to property sold in execution of a decree against the widow, which decree was alleged to be collusive and fraudulent, is governed by this Article—*Chhaganram v. Bai Motigavri*, 14 Bom 512 (514).

A suit brought by the reversioner during the life-time of the widow for a declaration that he is entitled to succeed, on the death of the widow, to property alleged to form part of her husband's estate, which property is in the possession of persons who claim it as their own adversely to the widow, is a suit governed by Article 120 and not by Art. 125, and time ran from the date when the defendants set up their own right—*Ramaswami v. Thayammal*, 26 Mad. 488 (490).

A suit brought by a remote reversioner, and not by the nearest reversioner, for a declaration that an alienation made by a female is valid only during her lifetime, is governed by Art 120 and not by Art. 125—*Bhagwanta v Sukhi*, 22 All 33 (F B), *Kunuar v. Bindraban*, 37 All. 195, *Venkata v. Tuljaram*, 1917 M W N. 30, 38 I C. 270; *Kalyathal v. Thirupathi*, 10 M L J 229, *Devraj v Shiv Ram*, 70 P.R 1914, 25 I.C. 463, *Thakar v. Ganeshi*, 15 P.R. 1916, 33 I C. 161; *Guntupalli v. Guntupalli*, 24 M L J 183, 18 I.C 710; *Suman Singh v. Uttam Chand*, 1 Lah. 69, 55 I.C 924, 91 P L R 1920, *Anandi v Ram Sahai*, 27 O C 173, A I.R. 1924 Oudh 381, 83 I C 1055, 1 O.W.N. 24. As regards the time from which limitation runs, see Note 509A *infra* under heading "Suit by remote reversioner."

An alienation made by the transferee from a Hindu female in possession with a limited estate, or by a stranger in possession holding under her, may furnish the nearest reversioner with a cause of action for a declaratory suit equally with an alienation made by the Hindu female herself. To such a suit the limitation applicable is that prescribed by Article 120 and not that prescribed by Article 125; and the cause of action arises on the alienation made by the transferee of the female, and

not on the transfer by the female herself—*Balbhaddar v. Prag Dat*, 41 All. 492 (502).

After the death of the widow of a Hindu testator, the reversioners may sue for construction of the testator's will and for a declaration of their reversionary rights. Such a suit may be brought, under this Article, within six years from the death of the widow when they became entitled to possession. A suit for possession would be governed by Article 141—*Chukkun v. Lolit*, 20 Cal 906 (925). A suit by a reversioner to restrain waste of moveable properties by the widow and praying that the properties be handed over to a receiver appointed for the purpose of preventing further waste of the properties, and that the donees from the widow be directed to replace any part of the property that can be traced in their hands, is governed by this Article, and time runs from the date of transfer by the widow—*Venkanna v. Narasimham*, 44 Mad 984 (987).

A suit by the reversioner to recover immoveable property on the death of a Hindu female is governed by Article 141, and a like suit in respect of moveable property is governed by Art. 120—*Runchordas v. Parvatibai*, 23 Bom. 725 (P.C.); *Pramatha Nath v. Bhuban Mohan*, 49 Cal. 45, 25 C.W.N. 585, 64 I.C. 980; *Aurabindo v. Monorama*, 55 Cal. 903, 32 C.W.N. 913 (921), A.I.R. 1928 Cal. 670. The right to sue accrues on the death of the widow—*Runchordas v. Parbatibai*, supra. But if the moveable property never reached the hands of the widow, but was all along held adversely to her by a stranger, the right to sue accrues to the reversioner from the date of such adverse possession—*Aurabindo v. Monorama*, supra.

501. Suits for pre-emption —Where the property is not capable of physical possession, and there is no registered deed of sale, a suit for pre-emption is governed by Article 120, and not by Art. 10—*Ali Gouhur v. Jawahir*, 30 P R 1892. Where a mortgage by conditional sale had been duly foreclosed under Reg XVII of 1806, a suit for pre-emption of the mortgaged property did not fall under Article 10 because the property was already in the possession of the vendee-mortgagee and there was no registered deed of sale, Article 120 applied, and the plaintiff's right of pre-emption accrued on the expiration of the year of grace and not from the date of the order of foreclosure—*Attar Singh v. Ralla Ram*, 103 P R. 1901 (F B.), *Sheoji Singh v. Sheoji Singh*, 129 P R. 1906; *Bahadur v. Alia*, 30 P R 1907, *Ali Abbas v. Kalka*, 14 All 405 (412) (F B.). A suit to declare a right of pre-emption against the heir of a mortgagee by conditional sale who has foreclosed under Reg XVII of 1806 is governed by this Article, where the subject of sale does not admit of physical possession and there is no registered deed of sale. Neither Article 10 nor Art. 144 applies to the case. Limitation begins to run from the date of expiry of the year of grace, that being the date when the mortgagee's right becomes mature—*Batal v. Mansur*, 20 All. 315 (F.B.), affirmed by the Privy Council in 24 All. 17 (26). Where a mortgage by conditional sale of a share in an undivided zamindari village

(which is not capable of physical possession), is foreclosed by proceedings taken under the Transfer of Property Act, the period of limitation for a suit for pre-emption runs under this Article from the date when the mortgagee obtains an order absolute for foreclosure and not when the mortgagee makes his application for an order absolute nor from the date fixed in the preliminary decree for payment by the mortgagor—*Raham Ilahi v. Ghasita*, 20 All 375 (377, 378); *Anwar-ul-Huq v. Jwala Prasad*, 20 All 358 (361).

A suit by one pre-emptor against another for the determination of the question as to whether the plaintiff or the defendant has the better right to pre-empt the property, is governed by Art. 120, and not by Art. 10—*Durga v. Haider*, 7 All. 167; *Ilahi v. Md. Rab*, 80 P.R. 1912, 14 I.C. 328; *Ram Persad v. Ganga*, 20 P.R. 1908. A suit for pre-emption against a transferee of the vendee (the transferee being impleaded during the course of the suit against the vendee) falls under Article 120 and not under Art. 10 (which applies to a suit against the vendee himself), for the suit against the vendee's purchaser is in effect a suit for a declaration that the pre-emptor plaintiff is not affected by the second sale, and that the second purchaser shall be bound by the decree which would ultimately be passed between the original parties to the suit. Time runs from the date of the transfer made by the vendee—*Karamdad v. Ali Md.*, 31 P.R. 1913 (F.B.), 18 I.C. 70, 61 P.L.R. 1913, *Fazal Husain v. Malik*, 49 P.R. 1914, 252 P.L.R. 1914, 25 I.C. 443, *Hari Ram v. Allah Ditta*, 17 P.R. 1915, 186 P.L.R. 1915, 28 I.C. 695, *Razawand v. Dukchor*, 1 O.L.J. 196, 24 I.C. 116 (117). Where the pre-emptor is already in possession of the land, and there is no registered deed of sale, a suit for pre-emption is governed by Art. 120 and not Art. 10, and time runs not from the date of sale but when the plaintiff becomes aware of the sale and of the terms of the sale—*Mammali v. Kunhipakki*, 38 Mad. 67 (70), 23 M.L.J. 607.

502. Suit on an award—A suit by the plaintiff to recover money awarded to him against the defendant by an award is not a suit for money, governed by the three years' rule, nor a suit for specific performance of a contract under Art. 113 (as an award is not a contract), but is a suit to enforce an award, governed by Article 120, as there is no other Article specially provided for the case—*Rajmal v. Maruti*, 45 Bom. 329 (335), 22 Bom. L.R. 1377, 59 I.C. 755; *Nandalal v. Chhotalal*, 49 Bom. 693, A.I.R. 1925 Bom. 519; *Kuldip v. Mahant*, 34 All. 43; *Sornavalli v. Muthayya*, 23 Mad. 593; *Bhajahari v. Behary*, 33 Cal. 891; *Radha Kishen v. Delhi Cloth Mills*, 32 P.R. 1913, 16 I.C. 804. See Note 471 under Art. 113. A suit to enforce an award, whether the same is signed by the parties or not, is governed by Art. 120. It cannot be treated as a suit on a contract. The fact that the award is signed by the parties makes no difference; the award is none the less an award, and does not become a contract when signed by the parties, and Art. 113 or 115 would not apply—*Harbhag Mal v. Diwanchand*, 102 P.R. 1915, 32 I.C. 88 (89).

503. Suit for injunction :—A suit for a perpetual injunction to restrain the defendant from preventing the plaintiff from entering a certain house falls under this Article, therefore, if it is found that the defendant has been in exclusive possession of the house for more than six years, the suit is barred—*Kanakasabai v. Muttu*, 13 Mad. 445.

A suit by the lessor for an injunction to restrain the lessee from interfering with the lessor's rights under a covenant in the lease to enter upon the land demised and to cut and take away certain trees, is governed by this Article and not by Article 113, 142 or 144, as none of those articles applies to a suit for injunction—*Waziran v. Babu Lal*, 26 All. 391 (393).

A suit for an injunction directing the defendants to close some windows newly opened by them on a partition wall, falls under this Article, and must be brought within six years from the date of opening of the windows—*Imambhai v. Rahim Bhai*, 49 Bom 586, 27 Bom L R. 503, A I R. 1925 Bom 373, 87 I C. 977

504. Suit for compensation-money —Where a land was acquired under the Land Acquisition Act, but the Collector refused to award any compensation, a suit to recover compensation would be governed by this Article and the right to sue accrued either from the date of the acquisition or the refusal by the Collector to award compensation Art 17 or 18 had no application to the case—*Rameshwar v. Secretary of State*, 34 Cal 470, *Mantharavadi v. Secretary of State*, 27 Mad 535. See notes under Arts 17 and 18

505. Suit by principal against agent or his representatives —A suit by principal against agent for account and for recovery of any money found due on taking accounts is governed by Art. 89, but so far as it seeks to obtain certain account papers from the agent, the suit is governed by Art 120, the cause of action arising from the date when such papers are to be submitted according to the contract between them—*Madhub v. Debendra*, 1 C L J 147.

A suit by the principal to recover money from the legal representatives of the agent is governed not by Article 89 but by this Article—*Kumeda v. Asutosh*, 17 C W N 5, 16 I C 742, *Rao Gurraj v. Raghunir*, 31 All. 429, *Seth Chand Mal v. Kalian Mal*, 96 P R 1886, *Fatima v. Intiazi*, 1 P R. 1912, 13 I C 930.

506. Suit in respect of trusts :—A suit for enforcement of the plaintiff's personal right to manage the trust properties is not a suit to recover the properties for the purposes of the trust, consequently section 10 can not apply and the suit is governed by this Article—*Balwant v. Puran*, 6 All 1 (P C) A suit to recover property settled on *invalid trust* would fall under this Article and not under section 10 The period of limitation commences from the time when the property was transferred to the trustees; because, in the case of invalid trusts, a resulting trust in favour of the donor accrues immediately the subject of the trust is transferred to the trustees, and the right to sue for it arises at once It cannot be said that the right to sue arises only when the trustees refuse to recognise the resulting trust—*Conasji v. Rustomji* 20 Bom. 511

A suit by a trustee to recover the advances made by him to meet the expenses of the trust, during his trusteeship, is governed by Art. 120, and not by Art. 132, and the period of limitation runs from the time when he ceases to be the trustee, *i.e.*, when he is judicially declared to be no longer the trustee or when he is dispossessed of the trust estate in pursuance of the judicial declaration. Limitation cannot run until there is a successor whom the plaintiff can sue, unless he can sue his successor there can be no right of suit and therefore limitation cannot start running—*Abkan Saheb v. Soran*, 38 Mad 260 (264, 265), 28 M.L.J. 347, 28 I.C 190

A suit by the deceased shebait's son to recover the advances made by the deceased shebait to meet the expenses of the debutter estate at a time when he had been wrongfully kept out of the office by the defendant is governed by this Article. The cause of action accrued when the plaintiff's father died, and not when the advances were made—*Peary v. Narendra*, 37 Cal. 229 (234) (P.C.).

Suit for improper management of trust funds:—The defendant neglected to purchase properties with the surplus income of a mosque as required by the trust deed. A suit was brought by the Advocate-General (under section 92 of the Civil Procedure Code, 1908), and it was claimed in that suit that the defendant should be charged with interest on the uninvested funds, so as to make up for the loss of rent which would have been recovered if properties had been purchased. It was held that the claim fell within this Article and was barred except as to six years prior to the filing of the suit—*Advocate-General v. Moulavi Abdul Kadir*, 18 Bom 401 (424).

507. Suit against son to recover father's debts:—

A suit against the son to enforce the liability under the Mitakshara Law to pay the father's debt, on the ground of the pious obligation of the son under the Hindu law to pay the debt due by the father, is governed by this Article, whether the debt is based on a bond—*Narsingh v. Lalji*, 23 All 206 (208); or on a mortgage—*Brijnandan v. Bidya Prasad*, 42 Cal. 1068 (1092) (F.B.); *Maharaj v. Balwant*, 28 All. 508 (516); or on a decree obtained against the father—*Periasami v. Seetharama*, 27 Mad. 243, (246, 254) (F.B.), *Rammayya v. Venkataratnam*, 17 Mad. 122 (129); *Natasayyan v. Ponusami*, 16 Mad 99 (101). In the Madras Full Bench case, the Judges expressed the opinion that if the suit were brought upon the original cause of action, *i.e.*, upon the original debt due by the father, the Article of limitation applicable would have been the same as against the father, *i.e.*, Article 32 and not Article 120—*Periasami v. Seetharama*, 27 Mad 243 (246, 254).

In case of a bond executed by the father, time ran when the bond became payable—*Narsingh v. Lalji*, (supra); in case of a mortgage executed by the father, the period ran from the due date of payment of the mortgage money or from the date of the father's death—*Maharaj v. Balwant*, (supra); and in case of a suit to enforce against the sons the decree-debt due by the father, time runs from the date of the father's

death—*Natasayyan v. Ponnusami*, 16 Mad. 99 (102); but in another Madras case it has been held that time runs from the date of the original debt, and not from the date of the father's death because the creditor does not obtain a fresh right to sue the son for his father's debt on the death of the father. There are not two causes of action in such a case—*Malliesam v. Jugala Panda*, 23 Mad 292 (F.B.) (dissenting from 16 Mad. 99). If the decree passed against the father had provided for payment of the money by instalments, time begins to run (in the suit against the sons) from the date on which each instalment becomes due—*Ramayya v. Venkataratnam*, 17 Mad 122 (129)

A suit by the principal to recover money from the sons and grandsons of the agent on the ground of their pious liability is governed by this Article and the cause of action accrues on the death of the agent—*Rao Girraj v. Raghubir*, 31 All 429 (438) See Note 414 under Art. 89

508. Other suits.—*Right to worship idol.*—A suit for declaration of an exclusive right to worship an idol is not a suit to establish a periodically recurring right under Article 131 but is governed by this Article—*Eshan Chunder v. Monmohini*, 4 Cal 683 (685).

Value of goods misappropriated :—Certain goods of the plaintiff which remained with the defendant's brother, had been appropriated by the latter to his own use. After his brother's death, the defendant sold the goods and held the proceeds as the agent of the widow of his deceased brother. Plaintiff brought the suit to recover the money from the defendant. Held that neither Article 48 nor 62 applied to this suit; the suit was one to enforce an equitable claim on the part of the plaintiff to follow the proceeds of his goods in the hands of the defendants and that Article 120 applied, there being no other Article applicable to the case—*Gurudas v. Ramnarain*, 10 Cal. 860 (P C)

Recovery of security-deposit —Where A made a deposit as security for the discharge of his duties as manager of an estate, which deposit was liable for all sums not accounted for by him, and a suit was, after his dismissal from appointment, brought by him for the recovery of the deposit, it was held that this Article applied to the case, and time began to run not from the date of his dismissal but from the time when the account of charges due against the deposit was made and sent in to him—*Upendra Lal v. Collector*, 12 Cal 113 (115)

Ousting a shebait .—A suit to oust a shebait or mutwalli from his office, the appointment to which is not hereditary but has been made by nomination, is one for which no period of limitation is specially provided and is therefore governed by this Article—*Jagannath v. Birbhadra*, 19 Cal 776 (779); *Debendra v. Sefatulla*, 31 C W N 184 (191), A.I.R. 1927 Cal 130.

Enforcing charge against moveable property pledged .—In a suit on a pledge of certain moveable property given by the defendant as security for a loan of money, the plaintiff prayed for a decree for the money against the defendant personally, and also prayed that the charge might

be enforced against the property pledged. It was held that the prayer for a personal decree was governed by Art. 57, but so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell under Article 120—*Nimchand v Jagabundhu*, 22 Cal. 21 (24); *Madan v. Kanhai*, 17 All. 284; *Mahalinga v Ganapathi*, 27 Mad 528 (530) (F.B.). Thus, where a plaintiff who had lent money on the security of eight black buffaloes, sought by his suit to enforce payment of the money charged upon the buffaloes and did not seek to get a personal decree against the debtor, the suit fell under this Article—*Deokinandan v. Gopua*, 16 A L.J. 449, 40 All. 142.

A decree is a moveable property, and a hypothecation of a decree is therefore a hypothecation of moveable property, governed by Art. 120. But where the decree is converted into immoveable property, that is, where the mortgagor-decreeholder purchases certain immoveable property of his judgment-debtor in satisfaction of the decree, the mortgagee becomes entitled to the substituted security and also to the larger period of limitation provided by Art. 132—*Jamna Dei v. Lala Ram*, 39 All. 74 (78).

Recovery of instalments of profession tax—A suit for recovery of instalment of profession tax under the provisions of the Madras Towns Improvement Act, 1871, is governed by this Article—*President of Municipal Commission v. Srikakulipu*, 3 Mad 124.

Apportionment of rent—A suit by a tenant against his landlord for apportionment of the rent payable to such landlord for the portion of land obtained by the landlord on partition out of what had theretofore been held by the tenant under all the co-sharers jointly, is not a suit for abatement of rent, but for apportionment of rent and for a declaration that after the partition the share of the rent which the plaintiff is liable to pay to the defendant is as it is stated in the plaint; there being no special provisions for a suit of this description, it is governed by this Article—*Durga v Ghosita*, 11 Cal 284 (286). But a suit by the holder of one share against the holders of other shares in an Inam land included in a single *patta* and assessed in an entire sum, for apportionment of the assessment, cannot be barred by this Article or by any other Article of the Limitation Act. So long as the joint liability lasts, each is entitled to claim an apportionment, and such claim can no more be time-barred than a claim for rent so long as the title to the land is not extinct. The suit is not therefore barred even if it is brought more than six years after the date of an order of a revenue officer making a previous apportionment of the assessment, as such order cannot be treated as conclusive—*Ananda v Viyyanna*, 15 Mad. 492 (493, 494).

Suit under O. 21, r. 93 for recovery of purchase-money:—No special period of limitation was fixed for suits brought under sec. 315 C. P. C. 1882 (O. XXI, r. 93 C. P. Code, 1908), for recovery of the purchase-money paid by the plaintiff, on the ground that the judgment-debtor possessed no saleable interest in the property in question; and therefore this Article applied to those suits—*Nilkanta v. Imamsahib*, 16 Mad. 361. But according to the Calcutta High Court, the suit was held

to be governed by Article 62—*Ram Kumar v. Ram Gour*, 37 Cal. 67 (70). Under the Code of 1908, the law has been materially altered, and the remedy of the auction-purchaser who seeks to recover purchase money under O. 21, r. 93, on the ground that the judgment-debtor had no saleable interest in the property, is not by a *suit*, but by an *application*, and such application is governed by Article 181—*Makar Ali v. Sarfuddin*, 27 C.W.N. 183, 50 Cal 115 (122). But where the execution sale took place and was confirmed before the new C. P. Code of 1908 came into operation, and the auction purchaser brought a suit, after the passing of the C. P. Code of 1908, to recover the purchase money, *held* that the right of the purchaser to maintain the present suit must be determined with reference to the Code of 1882 when the sale took place and confirmed, and that right was not extinguished by the promulgation of the Code of 1908. The suit was therefore governed by Article 120 of the Limitation Act of 1877—*Ibid*

Where upon a sale being set aside at the instance of the judgment-debtor under sec. 311 C. P. Code (1882), a suit is brought under sec. 315, C. P. Code, by the auction purchaser for recovery of a sum of money from a person who had, after the sale and the deposit of the money in Court, attached that sum in execution of his decree against the judgment-debtor, as representing the surplus sale proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder, the suit is governed by this Article—*Amrita Lal v. Jogendra*, 40 Cal 187 (191).

Suit for profits of share of intestate's property —A suit by an heir of an intestate to recover the share of profits accruing after the death of the intestate, from another heir who was in possession of the property, falls under this Article, and not under Article 109, because the occupation of a co-heir cannot be said to be 'wrongful'; Article 123 cannot apply, as the claim is not as regards the corpus of the estate—*Maung Po v. Maung Shwe*, 1 Rang. 405, A.I.R. 1924 Rang. 155, 76 I C. 855.

Customary dues :—A suit to recover *merais* or customary dues payable by the defendants for the benefit of a chattram on account of lands held by them is governed by this Article and not by Art. 110, because the dues are not rent claimed by the plaintiff as landlord but as due to the chattram by custom—*Venkataraḡava v. District Board*, 16 Mad. 305 (307).

A suit by a landlord to recover from his tenant *haq-i-chaharum* (i.e., one-fourth of the purchase-money due to the proprietor of a *mohalla* on the sale of a house situated in it) on the ground of local custom, is governed by this Article—*Kiratha v. Ganesh*, 2 All 358; *Sham v. Bahadur*, 18 All 430. Article 62 does not apply; moreover, it is not a suit to enforce any charge on the property; therefore Art. 132 also does not apply—*Ibid*.

A suit to recover a sum of money on account of marriage dues, due to the plaintiff by custom as an emolument of a hereditary office held by him in a temple, is not one for the possession of an interest in immoveable

property. Consequently Article 144 cannot apply; the suit is governed by this Article—*Rathna v. Tiruvankata*, 22 Mad. 351 (353).

Right to establish a market:—A suit against a Municipal Committee for a declaration of the plaintiffs' right to establish a market on their own land and for a perpetual injunction restraining the Collector as the President of the Municipal Committee from interfering with their so doing, falls under this Article, and must be brought within 6 years from the date on which the Municipality refused permission—*Biraj Mohun v. Collector*, 4 All 102 (106), affirmed on appeal, 4 All. 339 (F.B.).

Suit for share of profits in a ferry:—A suit by some of the co-sharers of a ferry against the other co-sharers for recovery of their share of the profits of the ferry is governed by this Article and not by Art. 36 or 115. Article 36 cannot apply because it is not the plaintiff's case that the defendants dispossessed them or committed any tort; Article 115 cannot apply because there is no proof of any express or implied contract on the part of the defendants to pay to the plaintiffs their share—*Xishun Dayal v. Kishen Deo*, 1 P.L.J. 69 (70), 35 I.C. 430

Damages for use and occupation—Some of the joint tenants of certain lands took the use and occupation of part of the joint lands, to the exclusion of the other joint tenants, who afterwards brought a suit for compensation for such use and occupation. It was held that the period of limitation for such a suit was governed by this Article, (and not by Article 110, because the suit was not one for rent); and that, therefore, the plaintiffs were entitled to recover compensation for six years—*Watson v. Ramchand*, 23 Cal. 799; *Madar v. Kader Moideen*, 39 Mad. 54 (56).

Suit for possession by non-occupancy raiyat.—If a non-occupancy raiyat has been dispossessed from his holding (either by the landlord or by a trespasser) otherwise than by execution of a decree, then if his tenancy has not yet been determined, he has a title to the land, *viz.* the title of a tenant, and his suit to recover possession of the holding on the basis of title is not a suit under sec. 9 of the Specific Relief Act, and is not therefore governed by Article 3, but falls under this Article or Art. 142—*Tamizuddin v. Ashrub*, 31 Cal. 647 (651) (F.B.).

Suit for arrears of assessment:—A suit by inamdar for arrears of assessment against a person who was not let into possession by the plaintiff under any agreement but who held the lands in the village, is not a suit for rent under Article 110 (because there is no relationship of landlord and tenant) but is governed by Art. 120—*Sadasiv v. Ramkrishna*, 25 Bom. 556; see also *Kasturi v. Anantaram*, 26 Mad. 730.

Suit by share-holder for dividends:—A suit by shareholders of a limited company for arrears of dividends is governed by Article 120 (and not by Art. 116)—*Rama Seshayya v. Tripurasundari Cotton Press*, 49 Mad. 468 (F.B.). See Note 480 under Article 116. The company does not, by the mere declaration of a dividend, become a trustee of the dividend for the shareholder; on the other hand, upon the declaration of the dividend by a company, the dividend becomes at once a debt. Banning-

p 35 In a suit by a shareholder for dividend, time runs from the declaration of the dividend—*In re Severn Ry Co*, [1896] 1 Ch. 559. *Re Artisans' Land Corporation*, [1904] 1 Ch 796

Suit by liquidator for calls.—A suit by the liquidator of a company, after winding up, against a shareholder for the amount of calls on the shares taken by him, is governed by Art 120, if the suit was brought by the company itself, Art 112 would have applied—*Parrell S. & W Co. v. Manekji*, 10 Bom 483.

Suit against Directors.—A suit by the official liquidator under sec. 235 of the Indian Companies Act (1913) calling upon the directors and the auditor to make good a large sum of money of the company which they have allowed to be mis-spent, is governed by this Article, and not by Article 36, 115 or 116—*In re Union Bank* 47 All 699, 23 A L J 473, A.I.R. 1925 All 519 A suit against the Directors for misapplication of the company's funds in *ultra vires* transactions falls under this Article, and time runs from the date on which the balance-sheet showing the losses ascertained was laid before the company at its general meeting—*Govind v. Rangnath*, 54 Bom 226, 32 Bom.L.R. 232

Suit for mesne profits.—A suit for recovery of profits of immoveable property received by the defendant during the period he was in possession of the property by virtue of a decree of Court (which was afterwards set aside) is governed by this Article and not by Art. 109, because the receipt of profits during that period under a decree which was valid at the time cannot be said to be 'wrongful' within the meaning of Art. 109. The cause of action arises when the decree by virtue of which the defendant obtained possession is set aside—*Holoway v. Ghuneshnar*, 3 C L J. 182.

Suit against Muhammadan widow by other heirs.—Where the mortgage-debt due to a deceased Muhammadan had been realised by his widow, and the other heirs of the deceased sued to recover the money from her, held that this Article applied; Art. 123 did not apply, because the widow was not an executor or administrator representing the estate of the deceased person. Article 62 might also apply to the suit—*Umardaraj v. Wilayat*, 19 All. 169 (172, 174). But see Note 514 under Article 123.

Suit by Zemindar for removal of trees planted by trespasser.—A suit by the Zemindar for removal of trees planted on the waste land in his Zemindary by a trespasser is governed by this Article, not by Art. 32, because a mere trespasser is not a 'person having any right to use property for a specific purpose' within the meaning of Art. 32—*Musharaf v. Ifikhar*, 10 All. 634 (635).

Suit on a pro-note.—A suit on a pro-note payable at any time within six years on demand from the date of its execution was held to be governed by this Article, as it is a special form of note not contemplated by Art. 73, and time ran from the date of the note—*Sanjivi v. Errappa*, 6 Mad 290. Mr. Rustomji has rightly criticized this ruling on the ground that Article 80 which is the residuary Article in respect of pro-note ought to have been applied, and not the most residuary Article 120; and that

the cause of action arose on the expiry of six years from the date of execution of the pro-note, the pro-note being taken as one payable after six years from its date. See *Rustomji, Limitation*, 3rd Edn., p. 353.

Suit to recover money drawn out of court by defendant:—Where the defendant under colour of a decree, since reversed, has intercepted the money which the plaintiff has realised by summary process under sec 583 C P. C., and the latter sues to recover by way of restitution the money so intercepted, his suit is governed by this Article—*Narayana v. Narayana*, 13 Mad 437 (442)

Suit for possession of office:—A suit for possession of the office of *Dharmakarta* of a temple based on a right by prescription and not on a hereditary right to it, and for possession of the property attached to it, is governed by this Article and not by Art 124; Art. 144 also does not apply as the right to the land was only secondary and dependant upon the right to the office—*Kidambi Raghavacharia v Tirumalai*, 26 Mad. 113 (115)

Suit by contributors to a common fund for distribution:—Plaintiffs, who had contributed to a common fund to be utilized for family requirements, brought a suit in which they claimed that their shares in the said fund should be determined and paid. Held that the suit was neither a partnership suit under Article 106 nor a suit based on contract under Article 113 or 115, that the claim was one which must be dealt with on equitable principles apart from any question of partnership or of contract, and that Article 120 applied and the cause of action accrued from the date on which the defendants refused to recognise the rights of the plaintiffs.—*Commercial Bank v Allavooden*, 23 Mad. 583 (592).

Suit for accounts:—Under the previous Acts, following the English law, a suit for accounts against a trustee was governed by 6 years' rule under Article 120, but under the Act of 1908 such a suit falls under section 10, and is never barred. But a suit for accounts against a person who is not a trustee is governed by Article 120. Thus, the *karta* of a family cannot be said to be a person in whom the property of the family is 'vested' for a specific purpose, he is not therefore a trustee; a suit against him for accounts is not governed by section 10 but by this Article—*Biswambhar v. Girebala*, 25 C.W.N. 356, A.I.R 1921 Cal 571, 58 I.C. 877. A suit for accounts brought by a legatee against the executors of a will falls under this Article and not under Art. 123, and the plaintiff is entitled to accounts only for six years before suit—*Gajanan v. Waman*, 12 Bom. L.R. 881, 8 I.C 189 (190).

But this does not mean that the earlier accounts cannot be required for any purpose whatever. When a person is liable to make good moneys which have come into his hands, the action is maintainable in respect of the balance in his hands six years ago, and the moneys received since, and what that balance was is a question with regard to which the earlier accounts are material. In other words, accounts previous to the six years are only material as evidence of what the defendant actually had in hand

at the date from which the account now to be taken is to run. *Lightwood*, pp. 284-285.

Suit by creditor to set aside alienation by debtor.—A suit under sec. 53, Transfer of Property Act, to set aside an alienation made by a debtor, is governed by Article 120, Limitation Act—*Narasimham v. Narayana*, 22 L.W. 592, A I R. 1926 Mad 66, 92 I.C. 405; *Venkateswara v. Somasundaram*, 7 L.W. 280, 44 I.C. 551. And time begins to run from the date on which the circumstances entitling the creditor to have the transfer avoided first become known to him, and not from the date of alienation—*per Phillips, J* in *Venkateswara v. Somasundaram* (supra); *Narasimham v. Narayana*, (supra, *per Madhavan Nair, J*) In the latter case, Venkatasubba Rao J is, however, of opinion that since the alienation is 'voidable at the option of the creditor' (sec 53, T P Act), the creditor may avoid it at any time at his pleasure, and the period of limitation runs from the date on which, the plaintiff decides to exercise his option of avoiding the transfer. Madhavan Nair J criticizes the view on the ground that the result of holding that the starting point for limitation is the exercise of option by the creditor would be that the creditor will be entitled to wait any number of years he pleases before bringing the suit, which would mean in effect that there would be no period of limitation at all for the suit.

Suits under Secs 104H, 111A, 111B of Bengal Tenancy Act—Suits which fall within the scope of sec 104H of the Bengal Tenancy Act are governed by the special rule of limitation provided in that section, but suits which fall outside the scope of sec 104H, the right to maintain which under certain conditions is expressly given by the proviso to sec 111A, are governed by Article 120. Thus, in a proceeding under Chapter X of the Bengal Tenancy Act, the plaintiffs claimed that they were occupancy raiyats in respect of the lands described in schedule *cha* of the plaint, but the Revenue Officer held that the plaintiffs were tenure holders and only in respect of schedule *ga* land, and settled the lands deducting 30 per cent for their allowance as such and recorded their subtenants as occupancy raiyats, and wrongly excluded *gha* and *una* schedules altogether from their lands. Thereupon the plaintiffs instituted the present suit. *Held* that so far as the plaintiffs are aggrieved by the rent settled as payable by them as tenure holders in respect of land of schedule *ga* and desire to have the entry corrected, the suit falls within the scope of sec 104H of the Bengal Tenancy Act and is governed by the special period of limitation prescribed therein, but in respect of the other relief, the suit falls within the scope of sec 111A, and is one under sec 42 of the Specific Relief Act, to which the limitation applicable is that provided by Article 120, Limitation Act—*Rajani v. Secretary of State*, 45 Cal 645 (652). A suit for a declaration that the entry in the Record-of-Rights that a person is a tenureholder is erroneous and that he should be declared a raiyat, is within the proviso to sec 111A, Bengal Tenancy Act, and the period of limitation is that provided by Art 120, and not by sec. 104H, B T. Act—*Midnapore Zemindary Co v. Secy. of State*, 34 C W N. 1 (P C.), 51

C.L.J. 1, A.I.R. 1929 P.C. 286, 120 I.C. 56. A suit under sec. 111B, Bengal Tenancy Act falls under Art. 120, and the right to sue accrues from the date of final publication of the Record-of-Rights, but the plaintiff is entitled to an extended period of limitation by three (now four) months, because sub-sec. (4) of that section provides that limitation is suspended for that period from the date of the certificate—*Asutosh v. Radhika*, 56 Cal 407, 119 I.C. 121, A.I.R. 1929 Cal. 481.

Suit by Muhammadan heir to recover moveable property:—A suit by the heir of a deceased Muhammadan to recover moveable property left by the deceased is governed by Art. 120, but if the property be immovable, the suit will fall under Art. 144—*Mariam Beeviammal v. Meera Saheb*, 29 Ind Cas 275, *Khadarsa v. Ayissa*, 34 Mad 511 (513); *Joti Pershad v. Sant Lal*, 34 P.R. 1914, 21 I.C. 919, 13 P.L.R. 1914.

A suit by one of several Muhammadan heirs for a share of the intestate's moveable property in the possession of another heir is governed by Art. 120, and not by Art. 49—*Bashirunnissa v. Abdur Rahim*, 44 All 244 (246), 20 A.L.J. 71, 64 I.C. 974.

Suit by adopted son to recover moveable property:—A suit by the adopted son to recover immovable property alienated by the widow before the adoption, is governed by Art. 144, if this property is moveable, Art. 120 applies, and limitation runs from the date of adoption—*Venkataramnam v. Venkataramiah*, 27 M.L.J. 569, 25 I.C. 692.

Suit for settlement of rent:—Where the Revenue Officer directed that the lands in question be recorded as liable to payment of rent, and it was then too late for the proprietor to apply under sec. 105, Bengal Tenancy Act for settlement of rent, a suit instituted in the Civil Court by the proprietor to have fair rent settled in respect of the lands is governed by this Article, and time begins to run from the date of the order of the Revenue officer—*Berhamdat v. Krishna*, 18 C.W.N. 466, 20 I.C. 910.

Suit to set aside municipal election:—A suit by a defeated candidate to set aside the election of members of a Municipal Board is a suit of a civil nature and maintainable in a Civil Court, and Art. 120 governs the suit—*Raghuandan v. Sheo Prashad*, 35 All. 308.

Suit by one co-owner against another for recovery of income:—A suit by one co-owner of a *jaghir* to recover his share of the net income from another co-owner who was appointed by the Government as the manager of the *jaghir*, is really a suit for accounts governed by Art. 120, and not one under Art. 62 because the suit is not for a definite sum of money received by the defendant for the plaintiff—*Subba Row v. Rama Row*, 40 Mad. 291 (293). See this case cited in Note 370 under Article 62.

Suit to set aside order of Government:—In 1903 the Government officials marked off the lands in suit and issued to the plaintiff a rough patta showing the lands to which Government admitted his right to obtain a grant subject to the usual conditions. The plaintiff preferred objection to the exclusion from the rough patta of the lands in suit. His objections were rejected in 1905. In 1913, the plaintiffs brought a suit to set aside

the order of dismissal of objection and for a declaration of his right. *Held* that Article 120 governed the suit, which was therefore barred—*Ambu Nair v. Secretary of State*, 47 Mad 572 (P.C.), 80 I.C. 835, A.I.R. 1924 P.C. 150, 29 C.W.N. 365.

509. "When the right to sue accrues" —There can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. Thus, a Hindu died leaving a will by which he directed that his property would go to his widow K and minor son T jointly and that in case the son died before his mother K, then the latter should be the owner of the property. The son T died during the lifetime of his mother K leaving a widow B, and a minor son M, B brought a suit against K claiming half the property on behalf of M, but this suit was withdrawn. Then K brought the present suit for a declaration of her right to the whole property under the will. *Held* that although K's right arose on T's death, still the period of limitation for this suit ran not from the date of T's death, but from the date of the suit brought by B, when the right of K was actually infringed or threatened to be infringed—*Bolo v. Koklan*, 34 C.W.N. 1169 (1175) (P.C.), 28 A.L.J. 1188, A.I.R. 1930 P.C. 270. Their Lordships further held that Article 123 or 127 might also apply to the suit.

Trespass :—In a suit for declaration that the defendants are not entitled to open a door in their wall and to commit trespass upon the platform of the plaintiff's well, it was held that each act of trespass constituted a fresh cause of action, and the suit brought more than nine years after the defendants opened the door, was not barred—*Sheo Prasad v. Mangar*, 12 A.L.J. 1150, 25 I.C. 185.

Entry in Revenue Records —The plaintiffs brought a suit for a declaration that an entry in the record of rights to the effect that the defendants have permanent occupancy rights in the suit-lands is not correct. *Held* that the period of limitation ran from the date of the publication of the entry in the record of rights, and not from any previous date when the defendants had set up rights of permanent occupancy in a written statement filed by them in a previous suit. The entry in the record of rights afforded a fresh cause of action to the plaintiffs—*Suryanarayana v. Bullayya*, 52 M.L.J. 323, A.I.R. 1927 Mad 568, 101 I.C. 85. But the mere entry of the defendant's name as owner of a property in the revenue papers does not give rise to a cause of action for the plaintiff in respect of a declaration of his title to the property, and time does not begin to run against the plaintiff until an *actual claim* is made by the defendant on the strength of the entry in the papers—*Dina v. Rama*, 23 C.L.J. 561, 34 I.C. 702, or until the defendant attempts to dispossess the plaintiff—*Suraj Kumar v. Umed Ali*, 25 C.W.N. 1022, A.I.R. 1922 Cal 251, 63 I.C. 954. The principle is, that if the owner is in possession of the property, it is not obligatory on him to file a suit for declaration of his title because of an adverse entry in the Khewat, unless and until his title to the property is denied by the defendant and the denial has the

effect of disturbing his possession or doing him some other injury that is not capable of being remedied otherwise than by a suit for a declaration. A cause of action for such a suit accrues when his right is substantially denied on the basis of that incorrect entry, and not when he has merely the knowledge of the adverse entry—*Faujdar v. Baldeo*, A.I.R. 1927 All. 597, 102 I.C. 172. Thus, where the defendant's name was entered in the Revenue papers in 1899, in respect of plaintiff's property, and then the defendant instituted a suit in 1903 for profits of the share of that property, *held* that the plaintiff's cause of action accrued on the latter date—*Skinner v. Shankar*, 31 All. 10 (Note). Plaintiffs having purchased certain lands in 1867 brought a suit in 1890 to obtain a declaration of their right to have the lands registered in their name in the Revenue records. It was held that the right to be placed on the register is a right which does not give rise to a cause of action until it is asserted or denied, and a suit for a declaratory decree in respect of it must be brought within six years from the time when the right was disputed. In the present case the right had not been asserted or denied until the present suit was filed, and the defendant denied the right in his written statement; the suit was therefore not barred—*Bhikaji v. Pandu*, 19 Bom. 43 (45). In 1888, the plaintiffs were wrongly recorded as exproprietary tenants of certain lands of which they were proprietors, and the defendants were recorded as proprietors. In 1903, the plaintiffs applied to have the record corrected, but their application was refused in 1904 and they were told to go to the Civil Court. In 1910 the defendants applied to have the rent assessed on the lands and obtained an order in their favour. The plaintiffs thereupon brought the present suit in 1912 for a declaration that they were the proprietors. *Held* that the cause of action arose in 1910 and not in 1904, because notwithstanding the order of 1904, the plaintiffs had remained in possession of the land without liability to pay rent therefor, and it was not until rent was assessed in the proceedings of 1910 that they became liable to pay rent. The order of 1910 gave the plaintiffs an entirely *fresh* cause of action—*Allah Jilai v. Umrao Hussain*, 36 All. 492 (495). So also, where the plaintiffs had all along been in possession of the land in suit, but in 1901 the settlement authorities had made an entry which showed that they were entitled to a smaller area, they objected to the entry, but their objection was rejected. They, however, remained in undisturbed possession of all the land to which they were entitled. In 1909 the Collector ordered that the entry should be corrected but the Commissioner set aside his order and the plaintiffs then brought a suit for declaration in 1910. *Held* that the suit was within time, in as much as the Commissioner's order of 1909 gave the plaintiffs a *fresh* cause of action as it was a fresh attack upon their title, whether the proceedings of 1901 gave them a cause of action or not—*Sheopher v. Deonarain*, 10 A.L.J. 413, 17 I.C. 675. An adverse entry in the record of rights even if allowed to remain unchallenged does not necessarily extinguish the rights of the party against whom such entry has been made, and *a fortiori*, an order to alter the entry to the prejudice of the party without the actual alteration of the entry cannot by itself extinguish the right unless the other party can prove

adverse possession for the statutory period or some similar reason in support of his plea of such extinction—*Fateh Ali v. Muhammad Baksh*, 9 Lah. 428, A.I.R. 1928 Lah. 516 (522).

The defendant who was shown in the revenue records as a *takarraridar* entitled to one-third share of the produce, issued a notice of ejectment in 1912 to the plaintiff who was shown in the revenue records to be the owner of the lands in suit. The plaintiff brought a suit in the Revenue Court to contest the notice but was defeated. Thereupon proceedings in execution of the notice took place; but the proceedings were purely formal, and in fact the plaintiff retained physical possession of the land in suit. In other words, so far as plaintiff was concerned, the ejectment proceedings of 1912 in no way affected his possession. A further notice of ejectment was then issued against him. *Held* that the fresh notice constituted a fresh invasion of his title and that therefore limitation for his suit for declaration of title began to run from the date of the fresh notice—*Bela Singh v. Lakshmi Das*, 6 Lah. 132, 26 P L R. 326, A I R 1925 Lah 391, 89 I.C. 299. The Revenue authorities had entered the names of the defendants as owners, and the names of the plaintiffs as in possession. Subsequently the defendants applied for partition, which was allowed by the Revenue authorities, whereupon the plaintiffs sued for a declaration of their title. *Held* that it was not obligatory on the plaintiffs to bring a suit after the first revenue proceedings in as much as they were not disturbed in their possession, and that the plaintiffs had a fresh cause of action from the date of the order of the Revenue officer in the partition proceedings—*Hakim Singh v Waryaman*, 140 P R 1907, *Jahana v Wali*, 98 P R. 1919, 53 I C 595, *Smail v Bahab*, 8 Lah 22, 100 I C. 732, A I R 1927 Lah 119. The principle deducible from these and the following cases is that if a plaintiff is in possession or enjoyment of the property in suit, he is not obliged to sue for a declaration of title on the first or each succeeding denial of his title by the defendant. He may look upon such denial with complacency or at his option may institute a suit to falsify the assertions of the other side. But when he finds that his rights are being actually jeopardised by the actions or assertions of the defendant, then he must take proceedings within six years from the date of such actions or assertions—*Fateh Ali v Md Baksh*, *supra*. The defendant's name was recorded as proprietress some 30 years before suit, and then she left the village and received no share of the profits, and within six years before suit she transferred a portion of the property. Thereupon the plaintiffs sued for declaration of their title. *Held* that the plaintiffs' cause of action did not arise when the defendant's name was recorded, but it arose when the defendant transferred the property—*Rahmatulla v Shamsuddin*, 11 A L J 877, 21 I C 609. The plaintiffs sued for a declaration of their proprietary rights in certain land, alleging that the land in dispute was in their possession, that the revenue authorities wrongly included it in the estate of the defendants, neither the plaintiffs nor the defendants being a party to the action of the Revenue authorities, and that the defendants on the strength of the said entry endeavoured to oust the plaintiffs from the land. *Held*, that the

cause of action of the plaintiffs did not accrue on the date of the entry in the settlement Records but from the date when the defendants attempted to oust the plaintiffs—*Natha Singh v. Sadiq Ali*, 20 P.R. 1900. A certain plot of land was recorded as the separate property of the defendants in the settlement records of 1887. In 1914 the defendants made an application for partition, claiming the plot as their separate property. In a suit brought by the plaintiffs in 1915 for a declaration that they were joint owners of the land with the defendants it was held that although a cause of action might have arisen by reason of the settlement entry in 1887, still a fresh cause of action arose in 1914 when the plaintiffs found themselves in danger of being actually deprived of their joint ownership. The suit was therefore not barred—*Kali Prasad v. Harbans*, 41 All. 509 (512), 17 A.L.J. 588, 50 I.C. 767. A was the sole owner of a land, but his brother-in-law B had the lands recorded in the Record of Rights as being held in joint tenancy by A and B. A took no steps to have the entry corrected and B made no attempt to draw material benefit from the land. Afterwards B instituted a suit in the Small Cause Court claiming to participate in the profits of the land. A suit by A for a declaration that he was the sole owner of the land, brought within six years from the receipt of the summons of the Small Cause Court, was in time, because the plaintiff's cause of action arose not from the publication of the Record of Rights but from the date of institution of the Small Cause Court suit which gave a serious challenge to his right—*Moulvi Alauddin v. Bibi Saibunissa*, 2 P.L.J. 557, 41 I.C. 199. Where there is a definite challenge to the plaintiff's rights, by an entry made in the Record of Rights, and where the fact is patent that the plaintiff must have been aware of that challenge to his rights, the suit if brought upon that challenge must be brought in accordance with the six years' rule of limitation, but if the plaintiff continues in possession in spite of the entry, he is not required to institute any suit for declaration upon that challenge but may institute a suit at any time within six years of any new challenge which has the effect of prejudicing his rights—*Ramji v. Lala Sadhusaran*, 2 P.L.J. 493 (495), 41 I.C. 11.

In the following cases it has been held that time runs from the date of entry in the revenue record: Thus, where the plaintiffs sued on the allegation that they were in possession as proprietors of certain lands erroneously recorded in the settlement as the property of the defendants, and prayed that the record may be amended and their own names recorded, held that the period of limitation was to be reckoned from the date of the entry (or from the date when the record of rights was sanctioned)—*Fazladd v. Mehndi*, 79 P.R. 1879. Where the settlement officer had expunged the name of the plaintiff from the Revenue papers and had wrongfully caused the name of the defendant to be entered, but the plaintiffs had all along remained in possession, notwithstanding the settlement record, and then sued for a declaratory decree, held that the period of limitation ran from the date of the entry in the revenue papers; it was further held that the wrong entry in the village papers was a wrong committed once for all and not a continuing wrong within the

meaning of sec. 23—*Legge v. Ram Baran*, 20 All. 35 (37) F.B. (It should be noted that in these cases there was no fresh invasion of the plaintiff's rights by the defendant, and consequently time ran from the date of entry in the records, and there was no fresh cause of action). The plaintiff's father had applied in 1903 for entry of his name in the Revenue-register as the jenmi of certain land, but the Revenue authorities refused to do so. In 1917, the plaintiff again applied to have the land registered in his name, but on the objection of the defendants the Revenue authorities refused to change the registry. He then brought a suit for a declaration that he was the jenmi of the land. Held that the suit was barred, as the cause of action arose in 1903 and the plaintiff did not acquire a fresh cause of action in 1917. If the defendants had attempted to disturb the plaintiff's possession or claim any right to the property in derogation of the plaintiff's right, such an act would have given a fresh cause of action—*Perambath Chathu v. Neela Kandhan*, 42 M.L.J. 457, A.I.R. 1922 Mad 194. Where the defendant's name was entered in the Revenue papers in 1895, and the plaintiff in 1903 applied for correction of those papers, when the defendant again asserted his title, and the Revenue Court refused to make the correction, whereupon the plaintiff instituted a suit for declaration of title in 1904, it was held that the plaintiff's cause of action arose in 1895, and no fresh cause of action accrued in 1903; the refusal to correct the entry in 1903 was merely a continuation of the original cause of action—*Akbar v. Turaban*, 31 All. 9. Where the defendant (landlord) in 1905 caused the name of the plaintiff to be entered in the Record of Rights as a tenant liable to pay rent, and on the strength of that entry he obtained a rent decree against the plaintiff in 1912, and then the plaintiff brought a suit in 1912 for a declaration that he was a *lakheraj* tenant and not liable to pay rent, it was held that the suit was substantially a suit under sec. 111A of the Bengal Tenancy Act for getting a declaratory relief in respect of Record of Rights, although the plaint made no mention of the Record of Rights, and therefore the cause of action for the plaintiff's suit accrued on the date of the publication of the Record-of-Rights in 1905 and not from the date of the rent decree of 1912—*Sheikh Amiruddin v. Sheikh Saidur*, 1 P.L.J. 73 (76), 35 I.C. 433. But the mere entry of the defendant's name in the village papers would not of itself give the plaintiff a cause of action if such entry was made without the knowledge of the plaintiff. The plaintiff's right to sue would accrue when he becomes for the first time aware of the fact that the name of the defendant was entered in the revenue papers—*Gopal Das v. Shri Thakur Ganga*, 20 A.L.J. 231, A.I.R. 1922 All 115, 66 I.C. 148. That is, time would run from the date of publication of the record of rights—*Abdul Fajur v. Abdul Jabbar*, 97 I.C. 635, A.I.R. 1927 Cal. 60. Where a wrong entry has been made in the revenue registers at the plaintiff's own instance, but the plaintiff has been in possession, and he seeks by a declaratory suit for the removal of the cloud which has been thus thrown upon his title, limitation runs from the date of the entry—*Mahabir v. Jageshwar*, 3 O.W.N. 896, A.I.R. 1927 Oudh 21.

(70); *Soman v. Uttam*, 1 Lah 69 (72), 91 P.L.R. 1920, 55 I.C. 924 In a Bombay case, a Hindu died leaving his widow and daughter. The widow made an alienation in 1869, but the daughter (who was then the immediate reversioner) did not impeach the alienation, and after the death of the daughter in 1879, the plaintiffs, who are her sons, brought a declaratory suit in 1883. It was held that the suit was barred, as the cause of action arose when the property was sold in 1869, during the lifetime of the plaintiff's mother who was then the nearest presumptive reversioner, and no fresh cause of action accrued to the plaintiffs on their mother's death; it could not have been the intention of the Legislature, in giving a right to sue for a declaration within six years from the accrual of the rights, to give successive rights to a series of successive reversioners to harass the alienees of an estate with repeated suits in respect of the same alienation—*Chhaganram v. Bai Motigavri*, 14 Bom. 512 (515). But this ruling was given under the Act of 1859 and should not be taken as good law now, because substantial changes have been made in the Acts of 1871, 1877 and 1908. Under Article 120 of the present Limitation Act, the question is not when the cause of action arises, but when the plaintiff's right to sue accrues.

The Allahabad High Court is of opinion (virtually dissenting from the above Calcutta ruling) that the failure on the part of the nearest reversioners to bring a suit for a declaration under Art. 125 within 12 years of the date of alienation does not create any new cause of action for the next reversioners to bring a suit within a further period of six years under Article 120. A remote reversioner is not entitled to sit still and wait for limitation to run out against every reversioner nearer in degree than himself. An improper alienation by a Hindu widow is a wrong to the entire body of reversioners, and it affords an immediate cause of action to all of them. In other words, the starting point of limitation for a suit by a remote reversioner is the date of alienation and the suit is governed by Article 120—*Kunwar Bahadur v. Bindrabai*, 37 All. 195 (202); *Anandi v. Ram Sahai*, 27 O.C. 173, A.I.R. 1924 Oudh 381. The same view has also been expressed in *Chiruvolu v. Chiruvolu*, 29 Mad. 390 (411), and *Narayana v. Rama*, 38 Mad. 396 (401).

If the nearest reversioner is found to have colluded with the widow in the matter of alienation, the remote reversioner is entitled to bring a suit for declaration, and the cause of action arises as soon as the fact of collusion becomes known to him—*Kunwar v. Bindrabai*, 37 All. 195 (200).

Suit by reversioner born after alienation:—An entirely different case arises when the suit is brought by a remote reversioner who is born after the date of alienation. It is a well known principle of law that one reversioner does not derive his title through another, (even though that other happens to be his father), but all of them claim from the last full owner; consequently the right of a remote reversioner to sue is not derived from the right of the nearer one. If therefore the right of the nearest reversioner for the time being to contest an alienation by the

widow is allowed to become barred by limitation as against him, this will not bar the similar rights of the subsequent reversioner who was born after the date of alienation. The subsequent reversioner's right to sue accrues only on his birth, and if he brings the suit while he is still a minor, or within three years after attaining majority, it is not barred, although more than twelve years have elapsed after the date of alienation—*Bhagwanla v. Sakhi*, 22 All. 33 (47) (F.B.); *Abinash v. Harinath*, 32 Cal. 62 (71). This was also the view of the Madras High Court in *Gobinda v. Thayammal*, 28 Mad. 57 (60) and *Narayana Aiyar v. Rama Aiyar*, 38 Mad. 396 (400, 405). But these cases have been overruled by the Full Bench case of *Varamma v. Gopala Dasaya*, 41 Mad. 659 (F.B.) In this case it has been laid down that the cause of action for a suit for a declaration that an alienation by a widow is not binding on the estate, arises on the date of alienation jointly and simultaneously for the entire body of reversioners. If, therefore, the alienation is not impeached by a declaratory suit within 12 years under Article 125 by the nearest reversioner, a remote reversioner born after the lapse of 12 years from the date of the alienation will be debarred from bringing a suit for declaration. The correctness of this ruling has been doubted in *Das Ram v. Tirthanath*, 51 Cal. 101, at p. 108; but it has been followed by the Lahore High Court in *Chiragh Din v. Abdulla*, 6 Lah. 405, 90 I.C. 1022.

The property of a Hindu female who was the daughter of the last male holder, and who was entitled to a limited estate, was during her minority sold by her guardian in 1891. The plaintiff (the last male holder's daughter's son) who is her reversioner, and who was not born at the date of the alienation, brought a suit in 1916 for a declaration that the sale was ineffective as against him. Held that the suit was governed by this Article and not by Article 125, as the alienation was not made by the female herself but by her guardian, and that the right of action accrued to the plaintiff when he was born (in 1896), and the suit was in time as it was brought within three years of his attaining majority (secs. 6, 8)—*Das Ram v. Tirthanath*, 51 Cal. 101 (108), 81 I.C. 522, A.I.R. 1924 Cal. 481.

PART VIII—*Twelve years.*

- 121.—To avoid incum- Twelve When the sale becomes
brances or under- years. final and conclusive.
tenures in an entire
estate sold for
arrears of Govern-
ment revenue, or in
a patni taluk or
other saleable tenure
sold for arrears of
rent.

510. Scope —This Article applies not only to a suit brought by the auction-purchaser at a revenue sale, but also to a suit brought by a transferee from such auction-purchaser who is entitled to the same rights as his assignor—*Koylash v. Jubur Ali*, 22 W.R. 29, *Wahid Ali v. Rahat Ali*, 12 C.W.N. 1029; see also *Shosi Bhushan v. Kramtulla*, 10 C.W.N. 148; *Narayan v. Kasiswar*, 1 C.L.J. 579.

511. Incumbrance —It has been held in a large number of cases that adverse possession is an incumbrance within the meaning of this Article or within the meaning of the Patni Taluq Regulation (VIII of 1819) or of Bengal Revenue Sale Act (XI of 1859)—*Nuffar Chandra v. Rajendra*, 25 Cal. 167 (171); *Karmi Khan v. Brojo Nath*, 22 Cal. 244 (251), or under the Assam Land and Revenue Regulation—*Prasanna v. Jnanendra*, 43 Cal. 779 (782). But it should be noted that where the estate is sold *subject to incumbrances*, the adverse possession of the defendant for the statutory period before the date of sale is not an incumbrance and a suit to recover possession is not a suit to avoid an incumbrance within the meaning of this Article, and is barred even though brought within 12 years from the date of sale. This view is deducible from *Kumar Kalanand v. Syed Sarafat*, 12 C.W.N. 528, and *Raimuddi v. Nalini Kanta*, 13 C.W.N. 407, 1 I.C. 81.

Thus, where the estate is sold (for arrears of revenue) subject to incumbrances and it appears that the adverse possession of the defendant had commenced before the estate was sold for arrears of revenue, (*i.e.*, if the defendant had been holding adversely to the old proprietor) and the adverse possession was sufficiently long, *i.e.*, for more than twelve years before the institution of the suit to avoid the incumbrance, the suit would be barred by limitation even though brought within 12 years from the date of the revenue sale. Such a suit is not governed by Article 121 but by Article 144—*Karmi Khan v. Brojonath*, 22 Cal. 244 (251).

Where the plaintiff purchased the estate with right to avoid incumbrances, but it was found that the adverse possession of the defendants and their predecessors commenced even *before the creation of the patni*, such adverse possession was not an incumbrance which the plaintiff was entitled to avoid within the meaning of this Article, and therefore this Article did not apply to a suit to recover possession from the defendants. (The suit fell under Article 144 and was consequently barred).—*Kalika-nand v. Bipradas*, 10 C.W.N. 18, 26 I.C. 436. The reason is, that an incumbrance, in order to be so, must be one which accrued upon the tenure by the act or inaction of the defaulting patnidar himself, and therefore an adverse possession, in order to be an incumbrance, must be a possession which has commenced *after* the creation of the *patni* tenure.—*Ibid*. Therefore, where the defendants had been holding adversely for a period greatly exceeding 12 years, and the evidence did not establish whether the defendants had commenced so to hold after the creation of the *patni*, the plaintiff's suit would fail, because in order to bring the case under this Article the onus would be upon the plaintiff to show that the adverse possession of the defendants commenced after the *patni* was created.—*Bipradas v. Kamini Kumar*, 48 I.A. 499, 49 Cal. 27 (34) (P.C.), 26 C.W.N. 465, 41 M.L.J. 638.

If the land is sold with *power to avoid incumbrances*, then a suit to recover possession of land from the adverse possessor is a suit to avoid incumbrances within the meaning of this Article, and the period of limitation runs from the date when the sale becomes final, and not from the time when the adverse possession commenced. Even if it is regarded as a suit under Article 144, still the period of limitation would run when the sale becomes final, the possession of the defendant being regarded as becoming adverse to the plaintiff only from the date of the auction-purchase.—*Nuffur Chundra v. Rajendra*, 25 Cal. 167 (171), *Prosanna v. Jnanendra*, 43 Cal. 779 (782).

The period of limitation runs when the sale becomes final and not from the date when possession was formally given to the purchaser at the sale.—*Prosanna v. Jnanendra*, 43 Cal. 779 (782), 31 I.C. 801.

A person who had been in possession of a portion of a revenue-paying estate adversely to the owner for more than 12 years before the estate was sold for arrears of revenue under the Assam Land Revenue Regulation 1886, would be considered as a joint proprietor liable to pay the revenue under sec. 63 of that Regulation, and therefore a 'defaulter' within the meaning of sec. 67, he held no 'incumbrance' which the auction-purchaser was called upon to annul by a suit within the period prescribed by this Article. Being a defaulter, his interest was sold away by the revenue sale, and the suit brought by the purchaser to recover possession of his share would be a suit for possession under Art. 142.—*Mahim Chandra v. Piyari*, 44 Cal. 412 (423, 424), 21 C.W.N. 537, 39 I.C. 213.

If the *patni* came to an end, not by reason of sale for arrears of rent, but by voluntary *relinquishment* by the patnidar in favour of the Zamindar,

a suit by the latter to recover possession of the land from the persons who had taken possession of it adversely to the patnidar was governed by Art. 144 and not by this Article, and time ran from the date when the defendants took possession and not from the date of relinquishment—*Gobinda v. Surja Kanta*, 26 Cal. 460 (463).

512. Under-tenure.—This Article refers to under-tenures which are not avoided *per se* by the sale but which are voidable at the option of the purchaser, such as a *durpalni* tenure which is voidable on the sale of a *patni* tenure. On a sale of a tenure for arrears of rent under Act VIII of 1869 or Reg. VIII of 1819 the under-tenures are not avoided *ipso facto*, but are voidable at the option of the purchaser; consequently this Article applies to a suit brought by the purchaser for that purpose—*Titu v. Mohesh Chandra*, 9 Cal. 683 (687) (F.B.) (overruling *Unnoda v. Mothooranath*, 4 Cal. 860).

122.—Upon a judg- Twelve The date of the judg-
ment obtained in years. ment or recognisance.
British India, or a
recognisance.

513. This article does not enable suits to be brought upon all judgments obtained in British India, but only provides a period of limitation for suits upon such judgments as can be sued upon—*Jivi v. Ramji*, 3 Bom. 207 (208). Thus, no suit can be brought upon a decree, the execution of which is barred by limitation—*Fakirapa v. Pandurangapa*, 6 Bom 7 (9); *Dhanraj v. Lakhrani*, 38 All. 509 (516). An action is allowed to be maintained on a judgment only where the judgment cannot be enforced in any other way—*Kalicharan v. Sukhoda*, 20 C.W.N. 58, 30 I.C. 824.

An order of the High Court in its insolvency jurisdiction is a judgment of the High Court, and a suit based upon such order is maintainable. Such a suit is governed by this Article—*Annoda v. Nobo*, 33 Cal. 560 (564).

Where the plaintiffs obtained a decree against the defendants' father and after his death the execution of that decree was refused as against the family property in the possession of the defendants, and thereupon the plaintiffs brought the present suit against the defendants to enforce the father's decree debt against the sons, *held* that the suit was not governed by Article 122, because the sons not being parties to the judgment obtained against their father, it was not binding upon them and they could not therefore be sued upon a judgment obtained against the father. It is a suit brought to enforce against the sons their pious obligation to discharge their father's debt, and falls under the residuary Article 120—*Periasami v. Seetharama*, 27 Mad. 243 (249) (F.B.). In another Madras case, under similar facts, it was held that the suit against the son was not a suit upon a judgment, because under the Civil Procedure Code no second suit would lie upon a previous judgment, the

remedy provided being its execution in the manner provided in the Code—*Ramappa v. Venkataratnam*, 17 Mad. 122 (120).

The Calcutta High Court holds that a suit may be instituted in the High Court on a decree of the High Court itself—*Attarmony v. Hurry Doss*, 7 Cal. 74 (75). But the Bombay High Court dissents from this view in *Merwanji v. Ashabal*, 8 Bom. 1 (13).

According to the Calcutta High Court, an action does not lie in that Court upon a judgment of the Calcutta Court of Small Causes—*Moonshi Golar v. Curceem Bux*, 5 Cal. 294. But the Bombay High Court holds that such suit is maintainable, if there is not sufficient moveable property of the defendant within the jurisdiction of the Small Cause Court, and there is sufficient immoveable property within the jurisdiction of the High Court—*Fakirappa v. Pandurangapa*, 6 Bom. 7 (10).

Where a suit on a judgment is barred, that judgment cannot be made the basis of a suit for the administration of the estate of the judgment-debtor. Thus, an application was made to the High Court for an order absolute for sale of the mortgaged property in execution of a mortgage-decree transferred to it for execution by a mofussil Court, and the application was refused on the ground that the mortgaged properties were outside the jurisdiction of the High Court, a suit was then brought by the decree-holder for the administration of the estate of the mortgagor (who had died already) and for sale of the mortgaged properties, more than twelve years after either the date of the original debt or the date of the mortgage-decree. Held that the suit was barred by limitation—*Jogemaya v. Thackomoni*, 24 Cal. 473 (488).

123.—For a legacy or Twelve When the legacy or
for a share of a resi- years. share becomes pay-
due bequeathed by able or deliverable,
a testator, or for a
distributive share of
the property of an
intestate.

514. Whether defendant must lawfully represent the estate —In earlier cases it was held that this Article applied only to cases in which the property was sought to be recovered as such from a person who lawfully represented the estate and whose legal duty it was to distribute the estate, as—for instance, an executor—*Issur Chandra v. Juggut Chunder*, 9 Cal. 79, *Azizul Huq v. Maryam*, 17 O. C. 157, 24 I. C. 45; *Khadirsha v. Ayissa*, 34 Mad. 511 (512). Therefore where a Mahomedan died intestate, the estate vested in the heirs and no one was bound by law to distribute the property, a suit by one of the heirs against the others to recover possession of his share was governed by Art. 144, if the property was immoveable, and by Art. 120, if the property was moveable, Article 123 did not apply to the case—*Khadirsha v. Ayissa*, 34 Mad. 511 (513); *Marian Beevammal v. Kadir Meera Sahib*, 29 I. C.

275 (278); *Zainab v. Ghulam Rasul*, 4 Lah. 402 (404), A.I.R. 1923 1ah. 519, 73 I.C. 425; *Azizul v. Maryam* (supra). So also, where the amount of a mortgage-debt due to a deceased Mahomedan was realised by the widow, and the other heirs brought a suit to recover the money from her, held that the suit fell under Article 120 and not under this Article, because the widow was not an executor or administrator representing the estate of the deceased and was not bound to distribute the shares of the plaintiffs—*Umardaraj v. Wilayat*, 19 All 169 (172). An executor *de son tort*, though he can be treated as incurring the liability of an executor for certain purposes, yet cannot be taken to represent the estate of the deceased. A suit to recover certain moveable properties of the deceased from such person did not fall under this Article but under Article 120—*Sithamma v. Narayana*, 12 Mad 487 (488). A person who obtained a succession certificate was not a person who either as executor or administrator represented the estate of the deceased, and he was not under any obligation to distribute the shares in the property of the deceased among those entitled to them. Article 123 did not apply to a suit brought against him by the other heirs of the deceased for the recovery of money collected by him—*Ahidannessa v. Isuf Ali Khan*, 50 Cal. 610 (614), A.I.R. 1924 Cal 142, 27 C.W.N. 941.

But the current of recent decisions is to the contrary. Thus, in a recent Madras case, it has been held that this Article applies to a suit against any person who is in possession of the estate and bound to pay the legacies, and is not confined to a suit against the executors or administrators only. "The wording of the Article 123 is general, it refers to a suit for a legacy or for share of residue bequeathed by a testator, and if the legatee has a cause of action against the person in possession of the assets of the testator, I do not see why there should be a further qualification that the person in possession of the assets should be an executor or administrator. I think it will be reading into the Article words which are not there, namely that the suit should be for a legacy or share of a residue against an executor or administrator." Article 123 applies to a suit for a legacy against any person rightly or wrongly in possession of the estate under such circumstances that he is bound to deal with it as the estate of the deceased. Therefore a suit to recover legacy against an executor *de son tort* falls under this Article—*Sri Raja Parthasarathy v. Sri Raja Venkatadri*, 46 Mad. 190 (F.B.), 43 M.L.J. 496, A.I.R. 1922 Mad 457. It follows as a necessary corollary that a suit for accounts by an heir of an intestate person against an executor *de son tort* is governed by Art. 123, and he is liable to account for mesne profits for a period of 12 years before suit—*Robson v. Administrator-General*, 30 P.L.R. 503, A.I.R. 1929 Lah. 753 (758); *Gopala Chetty v. Narayana Swami*, 23 L.W. 528, A.I.R. 1926 Mad. 681, 95 I.C. 33.

The Judicial Committee of the Privy Council applied this Article to a suit brought by a co-sharer of an estate to recover his share from the other co-heirs in possession of the estate, in a case of intestacy—*Maung Tun v. Ma Thit*, 44 Cal. 379 (P.C.), 21 C.W.N. 527, 10 Bur. L.T. 138, 38 I.C. 809, A.I.R. 1916 P.C. 145.

The Bombay High Court has also held that this Article applies to every suit where the plaintiff seeks to recover a distributive share of the property of an intestate, irrespective of whether the defendant is under a legal obligation to distribute it or not, and that the decision of the Privy Council in *Maung Tun v. Ma Thi*, (44 Cal. 370) displaced the previous rulings on this point—*Shrinbai v. Ratanbai*, 43 Bom 845 (1900). The Calcutta High Court has also applied this Article in a case in which the suit was brought not against the executor but against the legal representative of an executor who was in possession of the assets—*Khetramoni v. Dharendra*, 41 Cal 271 (274). (But the old view has again been adopted in the recent case of *Sourab v. Abbas Ali*, A I R 1926 Cal 490, 91 I C 725). The Rangoon High Court also holds (following the Privy Council decision) that this Article is applicable to a suit by one co-heir against the other co-heirs for a share in the corpus of an inheritance—*Maung Po v. Maung Shwe*, 1 Rang 405, A I R 1924 Rang 155, 76 I C 855, *Ma Nan v. Ma Shne*, 4 Bur L J 76, A I R 1925 Rang 233, 89 I.C. 609, *Ma Tok v. Mg Yin*, 3 Rang 77, A.I R 1925 Rang 228, 92 I C 489; *Ma San v. Mg Maung*, 5 Bur L J. 4, 95 I C 514, A I R 1926 Rang. 95.

A certificate of administration granted under Reg VIII of 1827 only indicates the person who for the time being is in the legal management of the property, but does not constitute the holder of the certificate a representative of the estate for the purpose of distributing it among his co-sharers. Therefore, a suit by certain co-sharers of a *deshpande vatan* to recover their allowance from a person who manages the estate under a certificate of administration does not fall under this Article but under Article 131—*Keshav v. Narayana*, 14 Bom 236 (241).

515. Suit for legacy.—This Article applies where the substantial claim is to recover a legacy, even though the legacy be not assented to by the executor, and whether or not the suit involves the administration of the whole estate—*Salebhai v. Bai Safabu*, 36 Bom. 111 (113).

Where the legacy is an annual allowance, and the plaintiff is receiving that allowance annually, a suit not to recover the legacy but to have it defined what the amount of the legacy is, does not fall under this Article—*Hemangini v. Nabin Chand*, 8 Cal 788 (802).

The mere fact that in a suit for legacy is a prayer for administration of the estate, as ancillary to the claim for legacy, will not take the case out of this Article and bring it under Art 129—*Rajamannar v. Venkatakrishnaya*, 25 Mad 361 (364).

Where a person has received a great portion of the legacy but he is not satisfied that he has received the whole of it, and brings a suit for account against the executors, the suit falls under Article 120 and not Art. 123—*Gajanan v. Waman*, 12 Bom L R 881, 8 I.C 189 (190). But if the suit is in effect a suit for legacy, a mere prayer for accounts will not oust the operation of Art 123. And if a suit is brought by a person who is entitled under a will to a legacy and to a share of the residuary

estate, but he does not ask for payment of the legacy nor for the ascertainment of the share of the residue but sets forth certain alleged acts of misconduct on the part of the defendants (who are administrators) with respect to their dealings with the property, and asks for an account and for damages, *held* that the suit must be treated as a suit for recovery of legacy under this Article (and the plaint should be amended accordingly), and not as a suit for accounts—*Cursetjee v. Dadabhai*, 19 Mad. 425 (432).

Limitation —A legacy is payable one year after the testator's death. Consequently, a suit for legacy is in time if brought within thirteen years after the testator's death—*Cursetji v. Dadabhai*, 19 Mad. 425 (432); *Sri Raja Parthasarathi v. Sri Raja Venkatadri*, 46 Mad. 190 (F.B.), 43 M.L.J. 486, A.I.R. 1922 Mad. 457 (476).

Moreover, the legacies are not payable until there are available assets to pay them, and therefore time under the statute does not begin to run until the executor or other person liable to pay it has in his hands money with which it could be paid—*Sri Raja Parthasarathy v. Sri Raja Venkatadri Appa Rao* (supra); affirmed on appeal, *Sri Raja Venkatadri v. Parthasarathy*, 48 Mad. 312 (P.C.), 48 M.L.J. 627, 29 C.W.N. 989, 87 I.C. 324, A.I.R. 1925 P.C. 105. Thus, a Hindu widow claimed certain property as the heir of her deceased son. She bequeathed by will the income of the property before her death. Her title was disputed by another lady who claimed to be the adoptive mother of the deceased son. The validity of the adoption was challenged by the natural mother (testatrix) and litigation followed. After her death, suits were filed by the beneficiaries under the will for the payment of the legacies. *Held* that the legacies did not become payable until the executor or other person liable to pay them had assets in their hands out of which to pay them, and no one could have had in his possession any fund representing the income of the estate until it had been finally decided by the Court that the adoption was invalid. And the suits to obtain the legacies, instituted within 12 years from the final decision of the Court declaring the adoption to be invalid were not barred by limitation—*Sri Raja Venkatadri v. Parthasarathy*, (supra).

516. Suit for share of residue —This Article applies to a suit by a residuary legatee to recover his legacy or share of legacy under a will and for an account for the purpose of ascertaining what that share is, whether the suit is brought against the executor or against the executor's legal representative—*Khetramani v. Dharendra*, 41 Cal. 271 (274, 275), 25 I.C. 370.

Where a will makes certain illegal dispositions of property, a suit by the heir of the testator for setting aside the will and for recovery of the property so disposed as undisposed of residue, falls under this Article, and must be brought within twelve years from the date of the testator's death, that being the date on which the residue becomes payable—*Hemangini v. Nobin*, 8 Cal. 733 (805).

This Article also applies where the claim is for the whole of the residue—*Kherodemoney v. Doorgamoney*, 2 C.L.R. 118, on appeal, 4 Cal. 455. See also *Bolo v. Koklan*, 34 C.W.N. 1169 (1175) (P.C.).

4 Bur. L.J. 76, A.I.R. 1925 Rang. 233, 88 I.C. 609; *Maung Po v. Maung Shue*, 1 Rang. 405, A.I.R. 1924 Rang. 155, 76 I.C. 855; *Ma Sar v. Mg Maung*, 5 Bur. L.J. 4, 95 I.C. 514, A.I.R. 1926 Rang. 95; *Maung Shue An v. Maung Tok Pyn*, 5 Rang. 582, A.I.R. 1928 Rang. 6, 106 I.C. 823. If a Mahomedan co-owner is in exclusive possession of the entire property, his possession is on behalf of all the other co-owners. If the co-owner in possession dispossesses any one of the other co-owners, the suit that is brought for recovery of possession is not a suit for a distributive share, but is a suit to recover possession of his defined, though undivided share of the property. Such a suit is not covered by Art 123 at all, but must fall under the general Article 144—*Rustam Khan v. Janki* 26 A.L.J. 1041 (F.B.), A.I.R. 1928 All. 467 (469), 111 I.C. 809 (reversing *Janki v. Rustam*, A.I.R. 1926 All. 745, 97 I.C. 139); *Ma Bi v. Ma Khatoon*, 7 Rang. 744, A.I.R. 1930 Rang. 72 (73), 121 I.C. 785.

Commencement of limitation—The plaintiff sued the defendant for her distributive share of the property of her intestate husband. The defendant applied for letters of administration and obtained the order in 1902. The suit was brought within six years from that date. It was held that the suit was within time, that until the right to obtain letters of administration was determined, the person entitled to represent the estate was unknown, and time began to run from the date of the judgment directing the issue of the letters of administration to the defendant—*Syed Fajez v. Sitara*, 15 C.W.N. 107, 13 C.L.J. 239, 7 I.C. 704.

A similar interpretation must be given to the words 'payable' and 'deliverable,' as used in this Article, a share in the property of an intestate would not be delivered until the administrator to whom letters of administration had been granted had in his hands the share to be delivered; and similarly a legacy or a share in a legacy also does not become payable until the executor or other person liable to pay it has in his hands money with which it could be paid—*Sri Raja Venkatadra v. Parathasarathy*, 48 Mad. 312 (P.C.), 48 M.L.J. 627, 29 C.W.N. 989, 87 I.C. 324, A.I.R. 1925 P.C. 105, 27 Bom. L.R. 823, 23 A.L.J. 261.

518. Effect of limitation :—The widow of a Parsi, who died in 1837 leaving two sons surviving him, took out letters of administration to the estate in 1838, and then solely possessed and enjoyed the property till her death in 1897, although she was entitled by law to a widow's share therein, and the sons were entitled to the remainder. A suit was instituted by the sons in 1897 to recover their share of the property. Held that their claim had become barred by this Article, and their right to such shares had been extinguished under section 28—*Navroji v. Perozebai*, 23 Bom. 80.

124.—For possession of Twelve When the defendant
an hereditary office. years. takes possession of
the office adversely
to the plaintiff.

Explanation.—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.

519. Hereditary office :—This Article applies only where the appointment to the office is by succession through inheritance. If the office is *not hereditary*, and the appointment is made by nomination, this Article would not apply—*Jagannath v Birbhadra*, 19 Cal 770 (779). Where succession is by nomination, by the holder in office, of his successor, it is not a hereditary succession. Hereditary succession is succession by the heir to the deceased under the law; the office must be transmitted to the successor according to some definite rules of descent which by their own force designate the person to succeed. There need be no blood-relationship between the deceased and his successor, but the right of the latter should not depend upon the *choice* of any individual. If the rule were that the senior chela of the Guru should succeed to his office on his death, that might be a case of hereditary succession, even if the Guru nominated him as his successor, when no rights flowed from such nomination. But where the right to succession is based solely on nomination, the succession cannot be treated as hereditary—*Mahant Parmananda Das v Radhakrishna*, 51 M L J 258, A I R 1926 Mad 1012, 97 I C 437. *Election* stands on the same footing as nomination *Ibid*. A suit to recover possession of the office of Dharmakarta of a temple, based on a right by *prescription* and not on a hereditary right to the office, is governed by Article 120 and not by this Article—*Kidambi Ragavachariar v Tirumalai*, 26 Mad 113 (115).

Where a *shebait* does not appoint his or her successor as provided in the will of the founder and where there is no other provision for the appointment of *shebait*, the management of the endowment must revert to the heirs of the founder, and the office of *shebait* henceforth must be hereditary in the founder's family, a suit for possession of such an office falls under this Article—*Jagannath v Runjit*, 25 Cal 354 (364). Where the testator appointed his wife trustee and the plaintiff as joint trustee, and directed that the succession thereafter should be hereditary, *held* that the office was hereditary. A hereditary office subject to a temporary incumbency by a person not in the direct line of succession is still an hereditary office—*Narayana v. Nagappa*, 22 L W. 870, A I R 1920 Mad 245, 93 I C. 923.

The plaintiffs sued for a declaration that they were hereditary *Khadims* of a certain Mahomedan *darga* and as such entitled to perform the duties

attached to the office for 21 days in each month, and during that period to receive the offerings made by the worshippers at the *darga*; it was held that the suit fell under this Article—*Sarkum Abu Torab v. Rahaman Buksh*, 24 Cal. 83 (90).

520. Suit for possession of property :—A suit to recover the hereditary managership of a temple and for possession of the properties of the temple is governed by this Article. There is no distinction as regards limitation between a claim to an office and a claim to the property of an endowment—*Gnanasambanda v. Velu Pandaram*, 23 Mad. 271, 279 (P.C.); *Ram Piari v. Nand Lal*, 39 All. 636 (640). A suit to recover possession of a choultry building belonging to a charity by one alleging himself to be its hereditary trustee is governed by this Article—*Singaravelu v. Chokkalunga*, 46 Mad. 525 (527), 43 M.L.J. 737, A.I.R. 1923 Mad 88, 70 I.C. 994

Therefore where the suit to recover the office of the trustee of a temple is barred, a suit to recover possession of the property of the endowment is also barred. At the same time the right to the property is also extinguished—*Gobindasami v. Dakshinamurthi*, 35 Mad. 92 (94); *Gnanasambanda v. Velu Pandaram*, 23 Mad. 271 (279) (P.C.); *Ramanathan v. Murugappa*, 27 Mad. 192 (196), *Ram Piari v. Nand Lal*, 39 All. 636 (640); *Alagiriswami v. Sundareswar*, 21 Mad. 278 (287).

521. Other suits :—A suit to assert the plaintiff's personal right to manage or control the management of the fund of a temple, by right of inheritance may fall under this Article—*Batwant v. Puran Mal*, 6 All. 1 (10) (P.C.). A suit for emoluments and honours of the office of *Adhyapaka* is governed by this Article—*Ragunathachariar v. Tiruvengada*, 8 I.C. 883.

An alienation of the management of a temple by the hereditary trustee is void and does not require to be set aside. Article 91 therefore does not apply to a suit brought by the succeeding trustee to recover the estate from the alienee. This Article will govern the suit—*Narayanan v. Lakshman*, 39 Mad. 456 (459). A suit by existing *karnams* for a declaration that the appointment of another person as *karnam* jointly with them is void, is not a suit for possession of the office of *karnam* (since the plaintiffs are already in possession) and this Article does not apply—*Lakshminarayanappa v. Venkataratnam*, 17 Mad. 395 (396). A suit by a *shebait* to have the conduct of the worship of a *thakur* and the custody of his image placed in proper hands would fall under this Article or Article 144—*Gossami Sri Gridharji v. Romanlalji*, 17 Cal. 3 (22) (P.C.). The nature of the suit intended to be covered by this Article must be a suit filed by a plaintiff who claims the office from a person who at that time holds the office himself. Where the plaintiff has not alleged that the office is now held adversely to him by any other person, and the suit is only against the trustees of the *Devasthanam* for the recovery of the emoluments, and incidentally it is a suit for a declaration of his right to the office, Article 124 does not apply, and no other Article applies—

v. *Jharula*, 42 Cal. 244 (252) (P.C.) (reversing *Jharulu v. Jalandhar*, 39 Cal. 887).

Where the right of trusteeship together with the temple and its endowments is alienated by a Hindu widow (who was the trustee) in favour of the defendant, a suit by the reversioners for a declaration of the invalidity of the alienation made by the widow and for possession of the temple properties, brought more than twelve years after the alienation but within three years after the widow's death is barred, in as much as it is one for recovery of an hereditary office and governed by Art. 124, not by Art. 141. There is no distinction between an alienation made by a female trustee and that made by a male trustee; the plaintiffs derived their title through the widow, and the possession of the defendant against her became adverse to the plaintiffs also—*Jagannadha v. Rama Dass*, 28 Mad. 197 (200, 201).

Where after the death of the last trustee of a public religious institution, the office devolved by inheritance on his male descendants by his two wives, and the management was for a time conducted by the two branches respectively in rotation, but afterwards the members of the junior branch had discontinued possession of the immoveable properties belonging to the trust, as also the performance of the duties appertaining to the office, and the members of the senior branch had been in turns successively in possession of the properties and had performed the duties to the exclusion of and adversely to the members of the junior branch for more than 12 years, held that the right of the members of the junior branch as a body had been extinguished, and not the right of this or that individual member only, and the members of the senior branch as a body had acquired the sole management of the trust—*Ramanathan v. Murugappa*, 27 Mad. 192 (196, 197).

Adverse possession by the defendant may be tacked on to the previous adverse possession of his predecessors-in-office. Therefore, where in a suit under this Article it was found that the defendant was in adverse possession of the office of *archaka* for 3 years, but his predecessors were successively in adverse possession for over sixty years, the suit was held to be barred—*Krishnaswami v. Veeraswami*, 36 M.L.J. 93, 49 I.C. 393.

For other notes on the subject, see Notes 618, 619 under Article 144.

125.—Suit during the Twelve The date of the alienation of a Hindu or years. tion.

Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an

alienation of such land made by the female declared to be void except for her life or until her remarriage.

524. Scope of Article .—The right to sue under this Article belongs only to the nearest reversioner, even though such reversioner be a female entitled only to a woman's estate in the property—*Bhagwant v. Sukhi*, 22 All. 33 (41) (F B); *Soman Singh v. Uttam Chand*, 1 Lah. 69 (70), 91 P.L.R. 1920, 55 I.C. 924.

A suit by the remote reversioner is governed by Art. 120, not by Art. 125—*Kalawathal v. Thirupathi*, 10 M.L.J. 229, *Venkata v. Tuljaram*, 1917 M.W.N. 30, 38 I.C. 270, *Guntupalli v. Guntupalli*, 24 M.L.J. 183, 18 I.C. 710; *Anandi v. Ram Sahai*, 27 O.C. 173, A.I.R. 1924 Oudh 381, 83 I.C. 1055; *Devraj v. Shivram*, 70 P.R. 1914, 25 I.C. 463, *Thakur v. Ganeshi*, 15 P.R. 1916, 33 I.C. 161, *Soman Singh v. Uttam Chand*, 1 Lah. 69 (70); *Abinash v. Harinath*, 32 Cal. 62 (71), *Kunwar v. Bindaban*, 37 All. 195 (202); *Bhagwant v. Sukhi*, 22 All. 33 (F.B.).

The Madras cases cited above seem to be no longer good law in view of the opinion expressed in two Full Bench cases that the first column of Article 125 may be so construed as to comprehend a remote reversioner allowed by law to sue in place of the nearest reversioner, and that a suit by a nearest reversioner contemplated by Article 125 is a representative suit brought on behalf of all the reversioners immediate or remote, in other words, a suit by a remote reversioner is also governed by this Article—*Chiruvolu v. Chiruvolu*, 29 Mad. 390 (at pp. 400, 411) (F.B.); *Varamma v. Gopaladasayya*, 41 Mad. 659 (F.B.)

This Article applies only to a suit by a reversioner for a declaration that an alienation made by the widow is not binding on the reversioner; but a suit by a reversioner for a declaration that an adverse possession set up by the defendants (who were originally tenants) in respect of certain properties is not binding on the reversioner, and that he is entitled to succeed to the properties on the death of the widow, is not a suit under Art. 125 but is governed by Art. 120—*Ramaswami v. Thayammal*, 26 Mad. 488 (490).

Article 125 provides for the case of a reversioner who seeks to challenge the alienation made by a Hindu female or other limited owner, it does not apply where the alienation was made by a transferee from a Hindu female limited owner or by a stranger holding under her—*Balbhaddar v. Prag Dat*, 41 All. 492 (502)

Moreover, this Article applies to a suit brought during the lifetime of the female who made the alienation. If the alienation was made by the plaintiffs' maternal grandmother, and the plaintiffs bring the suit after the death of the maternal grandmother, and during the lifetime of their mother,

the suit does not fall under this Article, but under Article 120—*Bhagwanta v. Sukhi*, 22 All. 33 (41) (F.B.); *Narayana v. Rama*, 38 Mad. 396 (399).

This Article does not apply where the alienation was not made by the female herself, but was made during her minority by her guardian. A declaratory suit in respect of such alienation falls under Article 120—*Das Ram v. Tirtha Nath*, 51 Cal. 101 (108), 81 I.C. 522, A.I.R. 1924 Cal. 481.

This Article would apply where the suit is brought by a person who was a remote reversioner at the time of the alienation, but who is the immediate reversioner at the time of institution of the suit; cf. the words of the Article: "who if the female died at the date of instituting the suit, would be entitled to possession." Thus, where the alienation was made by a female (the daughter of the plaintiff's uncle) in 1896, when the plaintiff's father was the immediate reversioner, and then his father died without questioning the alienation, and thereupon the plaintiff instituted the suit in 1909, *held* that the suit fell under Article 125, because the plaintiff was a person who would be entitled to the possession of the land if the female died at the date of institution of the suit—*Veerayya v. Gangamma*, 36 Mad 570 (572).

Article 125 applies to every case where the female making the alienation is a Hindu or a Mahomedan, and the immediate reversioners, who bring the suit, also belong to the same faith. But it is not necessary that the female making the alienation should be actually governed by the Hindu or Mahomedan Law. If it were so, the Article would be rendered superfluous in so far as it refers to Mahomedans, because under the Mahomedan law, a female never succeeds to a life-estate—*Nandan v. Wazira*, 8 Lah. 215, 100 I.C. 84, A.I.R. 1927 Lah. 198, 28 P.L.R. 341. In this case, this Article has been applied to Jats.

525. Alienation :—Where a creditor of the deceased male holder brought a suit against the widow for recovery of the debt, and in execution of the decree in that suit brought certain properties to sale, *held* that this did not amount to an alienation by the widow.—*Chhaganram v. Bai Motigavri*, 14 Bom. 512 (515)

But it is not necessary that the 'alienation' should be made by a written document. It is sufficient if the act of the female necessarily resulted in the transfer of the estate to the transferee. Therefore, the action of a Hindu widow, in causing a collusive suit to be brought against her and confessing judgment therein, whereby the plaintiff in that suit got a decree for possession of property of which the widow was in possession holding a Hindu widow's estate, amounted to an "alienation" of such property—*Sheo Singh v. Jeoni*, 19 All. 524 (526). Similarly, the widow's act of allowing a decree to be passed on a fictitious award by which the whole property of her husband was divided among certain female members of the family who thereby took absolute estate in the shares allotted to them, amounted to 'alienation' of the property—*Ram Sarup v. Ram Del*, 20 All. 239 (242, 243). The creation of occupancy rights by a widow is an alienation, and is invalid as against the right of the reversioner, and the

cause of action accrues when the occupancy rights are created—*Hira v. Chathu*, 1915 P.L.R. 115, 29 I.C. 789. A compromise made by a Hindu widow in respect of her deceased husband's estate by which certain moveable and immoveable properties of her husband are partitioned, amounts to an alienation, and is not binding on the reversioner even though it has been followed by a decree of the Court—*Sohan Bibi v. Hiran Bibi*, 1 I.C. 180 (All.). To see whether a compromise amounts to an alienation, the test is to find out whether the property is claimed by the opposite party by a title before the compromise, or whether he has first derived his title thereto by virtue of and under the compromise—*Gadiraja v. Venkiah*, 26 M.L.T. 180, 53 I.C. 271. Thus, a widow alienated the property, and after her death the daughter sued to set aside the alienation but subsequently compromised the suit by an agreement by which she acknowledged the validity of the widow's alienation and relinquished her claim. In a declaratory suit brought by the daughter's sons, it was held that the compromise by the daughter did not amount to fresh alienation—*Ibid*

Where a suit on a mortgage having been brought against a widow, she at first contested the suit, but later on abandoned her defence, whereupon a decree was obtained in that suit, and the mortgaged property was sold in execution of that decree, held that the widow's act of withdrawing the defence could not be said to amount to an alienation. To constitute alienation, it must be clearly proved that the widow had done an act which necessarily resulted in the transfer of the property. Moreover, the Court-sale could not be treated as a private sale, unless it was the result of some collusive arrangement—*Ranga Row v. Ranganayaki*, 35 M.L.J. 364, 47 I.C. 578. But the widow's act in allowing the mortgaged property to be redeemed by a person who is not a reversioner, amounts to an alienation—*Kanshi Ram v. Chet Kuar*, 10 Lah 237, 29 P.L.R. 584, A.I.R. 1928 Lah. 932, 111 I.C. 203

525A. Starting point of limitation.—The period of limitation runs from the date of the alienation. If the reversioner was a minor at the date of the limitation, then, by the application of secs. 6 and 8, he is entitled to institute his suit within three years after he attains majority, even though more than 12 years after the date of alienation—*Vecrayya v. Gangamma*, 36 Mad. 570 (572). It should be noted that this point has not been overruled by the Full Bench case of *Varamma v. Gopaladasayya*, 41 Mad. 659, because the question directly arising in the Full Bench case was in relation to a suit brought by a person born after the date of alienation and not to a suit by a person who was a minor at the date of alienation. See 41 Mad. 659 at p. 671. But see 52 M.L.J. 13 in Note 526 below.

Where a mortgage was executed by the widow's *de facto* guardian during her minority, and the widow after attaining majority executed a mortgage of the same property in renewal of the previous mortgage, the period of limitation for a declaratory suit by the reversioners ran from the date of the original mortgage executed by the widow's guardian, as though

It had been executed by the widow herself. No fresh cause of action was given by the mortgage executed by the widow herself—*Adैया v. Govindu*, 58 M.L.J. 417. A Hindu widow alienated some of her husband's properties in 1874; her daughters sued in 1892 to have the alienation set aside, but withdrew the suit on the ground that the alienation was valid. The daughter's son sued in 1895 for a declaration that neither the original alienation nor the withdrawal of the suit affected their rights. Held that the withdrawal of the suit was a confirmation of the alienation of 1874 and gave the plaintiffs a fresh cause of action, so that the present suit was not barred—*Mullapudi Ratnam v. Mullapudi Ramayya*, 25 Mad. 731. But in 35 M.L.J. 364 cited above, the withdrawal of a suit was held not to amount to an alienation or to give a fresh cause of action. Similarly, in *Gadiraja v. Venkiah*, 26 M.L.T. 180, 53 I.C. 171 (cited above) a compromise of a suit did not give a fresh starting point for limitation.

526. Effect of bar of limitation:—Although the nearest reversioner may be debarred by lapse of time from bringing a suit under this Article, the remote reversioner will not necessarily be barred likewise. The principle is that one reversioner does not derive his title through another, but all of them claim from the last full owner; therefore limitation against a nearer reversioner does not operate as a bar against a remote reversioner—*Abinash v. Harinath*, 32 Cal. 62 (71); *Bhagwanta v. Sukhi*, 22 All 33 (F B). The Madras High Court however holds that a suit by a reversioner to set aside an alienation by a Hindu widow, is a representative suit on behalf of all the reversioners, then existing or thereafter to be born, and all of them have but one cause of action, which arises on the date of the alienation. Hence, if by failing to sue within 12 years allowed by Article 125, the existing reversioners become barred by limitation, the reversioners thereafter born are equally barred—*Varamma v. Gopaladasayya*, 41 Mad. 659 (P B.). A similar view has been expressed in *Chiruvolu v. Chiruvolu*, 29 Mad 390 (F.B.). The Judicial Committee have also expressed the view that the reversioner's suit in such cases is a representative suit in which he represents not only himself but the whole body of possible reversioners—*Venkatanarayana v. Subbammal*, 38 Mad. 406 (P.C.), *Janki Ammal v. Narayanasami*, 39 Mad. 634 (P.C.).

The principle of the Madras Full Bench case cited above has been recently applied to a case of a reversioner who was a minor at the date of alienation and brought a suit after attaining majority, more than 12 years after the alienation; and it has been held that if at the date of alienation by the female, one of the reversioners was a minor, but the other reversioners who could have brought a suit did not bring a suit within the period of 12 years, a suit thereafter brought by the minor reversioner after attaining majority was barred—*Neela Kantamier v. Chinnu Ammal*, 52 M.L.J. 13, 99 I.C. 668, A.I.R. 1927 Mad. 216.

Further, it should be noted that this Article applies only to suits filed during the lifetime of a female for obtaining a declaratory decree. If, however, no suit is filed during her lifetime by the presumptive heir, a separate right, viz., the right to immediate possession, arises on the death

of the female—*Prosanna v. Afzolonnessa*, 4 Cal. 523 (525). In other words, where a reversioner neglects to sue for a declaration that an alienation made by the widow is invalid and not binding on him, within the time allowed by this Article, he does not thereby lose his right to question the alienation on the death of the widow by instituting a suit for possession under Art. 141—*Bapayya v. Akamma*, 36 I.C. 255 (Mad.); *Chiruvolu v. Chiruvolu*, 29 Mad. 390, 408 (F B.), *Mesraw v. Girijanundan*, 12 C.W.N. 857 (859).

126.—By a Hindu gov- Twelve When the alienee takes
erned by the law of years. possession of the prop-
erty.
the Mitakshara to set
aside his father's
alienation of ances-
tral property.

527. Scope of Article :—This Article applies to suits to 'set aside' a father's alienation, i.e., to cases where immediate relief is sought; it does not apply to a suit for a mere declaration that an alienation made by the plaintiff's father and the widow of his father's divided brother would not affect his reversionary rights—*Dev Raj v. Shivram*, 70 P.R. 1914, 25 I.C. 463. Such a suit falls under Article 120.

A suit not for a declaration of the invalidity of the alienation but for annulment of the sale, is governed by this Article and not by Article 120; and it is not necessary for a suit under this Article that the plaintiff should pray for possession of the property, along with the prayer for annulment—*Gokha Ram v. Sham Lal*, 3 Lah 426 (430), 77 I.C. 174, A.I.R. 1923 Lah 268. Even if the plaintiff claims possession, the suit falls under this Article; the words "to set aside a father's alienation" include also a suit in which possession is claimed—*Munia v. Ramasami*, 41 Mad. 650 (655). The Privy Council have applied this Article to a case in which the plaintiff sought to recover possession from the alienee—*Ranodip v. Parmeshwar*, 47 All. 165 (P.C.), 52 I.A. 69, A.I.R. 1925 P.C. 33, 29 C.W.N. 666, 86 I.C. 249. A suit to set aside the alienation as well as to recover possession falls under this Article—*Chintaman v. Bhagvan*, 30 Bom L.R. 1095, A.I.R. 1928 Bom 383, 113 I.C. 378.

Article 126 is based upon the principle that a son's knowledge of the alienation by his father ordinarily arises when he sees the alienee in possession. In cases where the alienee never gets possession no limitation can arise under Art. 126. In such cases the right of the son would be merely to obtain a declaration that the deed is invalid. The limitation prescribed for such a suit is six years under Article 120—*Bindeshri v. Sital*, 50 All 163, 25 A.L.J. 734, 106 I.C. 377, A.I.R. 1927 All 702; *Angad v. Bahadur*, 27 A.L.J. 1131, A.I.R. 1929 All 750 (751); *Chintaman v. Bhagvan*, supra.

This Article which provides for a suit by a Hindu to set aside his father's alienation of ancestral property, applies also to a suit where

the alienation was made by the father in conjunction with an uncle.—*Deonandan v. Musafir*, A.I.R. 1927 All. 54, 97 I.C. 591.

A suit by an adopted son (governed by Mitakshara) to set aside an alienation made by his adoptive father falls under this Article—*Milap v. Mohni*, 5 O.W.N. 515, A.I.R. 1928 Oudh 348 (351), 110 I.C. 180. This Article would apply even though the father alienated the ancestral property as the manager and guardian of his minor sons. Article 44 would not apply to such a case as there can be no guardian of coparcenary property—*Ganesh v. Amrithasami*, 1918 M.W.N. 892; 44 I.C. 605. But where a father alienated the property of his son which his son acquired from his mother and which was the son's *exclusive* and *separate* property, this Article cannot apply, because the property was not ancestral property—*Arumugam v. Pandiyam*, 40 M.L.J. 475, 13 L.W. 416, 62 I.C. 630, A.I.R. 1921 Mad. 425. This Article only applies where the property dealt with by the father is the joint ancestral property of himself and his son. And so, where the grandfather devised property to his son and minor grandson *not jointly* but *exclusively* to each separately, the property thus acquired by the father and son is not ancestral property, and an alienation by the father of the son's property is not governed by Art. 126. As the alienation was made by the father during his son's minority, Art. 44 applied—*Ramaswami v. Govindammal*, 56 M.L.J. 332, A.I.R. 1929 Mad. 313 (316), 118 I.C. 481.

A suit by a son to obtain a share by partition of joint family property under the Mithila Law, the father's share having been sold in execution of a decree, is not a suit to set aside an alienation (for execution sale is not alienation), but one to which Art. 127 would apply—*Issuridutt v. Ibrahim*, 8 Cal. 653 (655).

The doctrine of right by birth in the son is wholly antiquated and inconvenient for modern times. The Privy Council (in 34 All. 296) have taken advantage of the texts relating to the father's power of alienation for antecedent debts, to mitigate the inconvenience of that doctrine, and the legislature has provided by a special Article 126 for the perfection of the title of an alienee from the father when a Hindu son who wants to take advantage of the antiquated Mitakshara law seeks to set aside such an alienation. It is significant that the alienation under Article 126 need not be for consideration. It is also significant that Article 126 applies alike to an alienee with and without notice. The Legislature has clearly fixed an overt and patent fact, namely the taking of possession of the property by the alienee as the event from which the period has to be calculated, so as to avoid as far as possible the difficult question as to notice—*Munia Goundan v. Ramasami*, 41 Mad. 650 (656).

This section does not apply to a *Jaina* governed by a tribal custom—*Milap Chand v. Mohni*, 5 O.W.N. 515, A.I.R. 1928 Oudh 348 (351), 110 I.C. 180.

528. Moveable property :—A suit to set aside a sale of *hnt jalmari bahis* purchased with ancestral funds, would be governed by

Art. 126. This Article refers to both moveable and Immoveable property belonging to a joint family—*Kishen v. Shib*, 6 A.L.J. 614, 3 I.C. 505.

529. When time runs :— The cause of action accrues when the alienee takes possession, and no new cause of action arises on the death of the plaintiff's father—*Ramasami v. Vanamamalai*, 26 I.C. 873. If the father at first executes a mortgage of the property in 1905, without possession, and afterwards he sells the property to the mortgagee in 1918 and gives possession, and then the son brings a suit in 1924 to set aside the alienation, the suit is not barred, as time runs only when the alienee takes possession in 1918, and not from 1905. Before 1918, the plaintiff had merely a right to sue for a declaration under Art. 120 that the mortgage was not binding upon him. That suit was no doubt barred in 1924 (as more than 6 years had elapsed since 1905), but the fact that such a suit for declaration brought in 1924 in respect of the previous transaction (mortgage) might have been too late, does not suffice to make the present suit time-barred—*Chintaman v. Bhagvan*, 30 Bom L R. 1095, A.L.R. 1928 Bom. 383 (384), 113 I.C. 378.

A family property owned by a father and his undivided son A was mortgaged with possession by them both to B in 1892. In 1897, the equity of redemption in the entire property was sold to C by the father as though it were his self-acquired property. In April 1898, C paid up the mortgage amount and obtained possession of the property from the mortgagee. On his father's death, A sold his half share to D, who then brought a suit in August 1912 against A, B, and C for possession of A's half-share on payment of half the mortgage-debt. Held that the suit was governed by this Article, being in effect a suit by the son's transferee against the father's transferee to set aside the transfer by the father, and was barred, having been brought more than 12 years after C took possession (April 1898). Even if Article 126 did not apply, Article 144 did, and the suit was equally barred because when C took possession in 1898, he took possession as the sole owner of the equity of redemption of the entire property and not of the half share of the father only, consequently his possession became adverse from that date—*Munia Goundan v. Ramasami*, 41 Mad. 650 (652, 658).

If the plaintiff was a minor when his father alienated the property, the provisions of sec 6 and 8 will apply. If the plaintiff fails to bring the suit within 3 years of his attaining majority (sec 8), it will be barred, and his right to the property will be extinguished—*Lachmi Narain v. Kishan Kishore*, 38 All. 126 (130).

If the son fails to bring a suit to set aside his father's alienation within the period prescribed by this Article, his right becomes extinct, and the property becomes the property of the purchaser and ceases to be joint family property. Consequently, any other son or grandson of the alienor, born after the expiry of the period of limitation can no longer question the alienation, because the property having passed absolutely to the purchaser, these sons or grandsons do not acquire any interest in the property and

consequently no suit by them is maintainable—*Lachmi Narain v. Kishan Kishore*, (supra).

530. Suit by son born after date of sale :—Plaintiff's father sold away all the family properties in 1885; the alienees eventually obtained possession in 1899. The plaintiff, who was born in 1901, brought a suit in 1910 to recover his share in the property. It was held that as the entire family property was sold away in 1885, there was no joint family property in which the plaintiff had an interest by birth, and therefore he could not question the sale—*Soundarajan v. Saravana*, 30 M.L.J. 592, 34 I.C. 794 (796)

127.—By a person ex- Twelve When the exclusion be-
cluded from joint years. comes known to the
family property to plaintiff.
enforce a right to
share therein.

530A. Scope :—A suit to enforce a right to a share means a suit to obtain actual possession of a share. Where the suit is for a declaration that the plaintiff is entitled to a share at some future date in the property the suit does not fall under this Article but under Art. 120. A suit to enforce a right is something different from a suit to establish a right—*Krishnaje v. Annaje*, 54 Bom 4, 31 Bom.L.R. 1240, A.I.R. 1930 Bom 61 (63), 124 I.C. 773.

531. Joint family property :—In order to bring a suit within this Article it will have to be shown that there had been a joint-family property, and that the plaintiff had been excluded from the enjoyment of such property and therefore desires to enforce his right to share therein. The word "excluded" in this Article implies previous inclusion, and a suit contemplated by this Article cannot be maintained by a person who had never had any portion of the joint property—*Saroda Soondury v. Dojamoyee*, 5 Cal 938 (940). Consequently, this Article only applies to persons who are members of a joint family and claim a right to share in joint family property, upon the ground that he is a member of the family to which the property belongs—*Kartik v. Saroda*, 18 Cal. 642 (645). Therefore, the provisions of this Article do not apply to a suit by a person who claims to inherit property as a daughter's son (who is not a member of the joint-family)—*Mathura v. Barkant*, 11 C.L.R. 312; or to a suit by a daughter who after her father's death left her father's family and had lived in her husband's house and never in her paternal residence with the members of the joint family; to such a suit Article 142 or 144 would apply—*Kartik v. Saroda*, (supra). So also, Art 127 does not apply where the plaintiff is a stranger who had purchased a share in the joint-family property from one of the members thereof who has been excluded from possession—*Harendra v. Aunardi*, 14 Cal 544 (545); *Ram Lakhi v. Durga Charan*, 11 Cal. 680 (682); *Bhavrao v. Rakhmin*, 23 Bom 137 (140); *Muthusami v. Ramkrishna*, 12 Mad. 292. To such a case, the rule

of limitation in Art. 136 or 144 applies—*Ram Lakhi v. Durga Charan*, (supra); *Bhavrao v. Rakhmin*, 23 Bom. 137.

A suit brought by the plaintiffs for a declaration that they and the defendants are the members of an undivided Aliyasantana family, and that the plaintiff no. 1 as the senior member of the family is entitled to have the lands registered in his name, falls under this Article. The words 'to enforce a right to share therein' show that under this Article it is not necessary that the plaintiff should be able to claim a definite share and enforce partition; all that is necessary is that he should claim to be entitled to a share in the joint property, although that may be, as under the Aliyasantana law, indivisible—*Muttakki v. Thimmappa*, 15 Mad. 186 (191). A Buddhist father, on his remarriage, made over the land in suit to his four children by his first wife, by a registered deed, towards their mother's share of the inheritance in full satisfaction. He continued to be in possession but managed the land for the joint benefit of the children. One of the daughters died and her husband sued for her share and mesne profits, more than 12 years after the execution of the deed. Held that this Article did not apply, as it is doubtful whether the property in suit can be called a joint family property, and there was no evidence that the plaintiff was excluded from the property. Article 144 governed the suit, and it was not barred, as the possession of the father was not adverse to his children—*Maung Aung v. Maung San*, 5 Rang. 576, A.I.R. 1928 Rang. 13, 105 I.C. 598.

In order to bring a case under this Article, the plaintiff must prove that at the time he was excluded from the property in dispute it was the joint-property of an existing joint family. It is not enough that the property in dispute had been a joint family property at some previous period—*Gajraj v. Sadho*, 15 O.C. 397, 16 I.C. 882 (883).

The expression "joint family property" must be read as property appertaining to a joint family. Where at the date of the suit the family has been divided in status, and the property has ceased to be joint family property and is held by the sharers as tenants-in-common, Art. 127 is inapplicable—*Yerukola v. Yerukola*, 45 Mad. 648 (F.B.), 42 M.L.J. 507, A.I.R. 1922 Mad 150, *Krishnajee v. Annajee*, 54 Bom. 4, 31 Bom. L.R. 1240, A.I.R. 1930 Bom. 61 (62), 124 I.C. 773. Where a member of a Hindu family is divided in status from others, and is in enjoyment of some portion of the family properties, while others enjoy other portions, he is not in law excluded or ousted from those other portions. In such a case, Article 127 cannot apply because the plaintiff is not a person excluded from joint family property, but only a tenant-in-common excluded from the common property—*Kumarappa v. Sarinatha*, 42 Mad. 431 (439). Where a joint-family property is actually divided, and one of the co-shares subsequently deposits money which he has received for his share with another co-sharer, that money is no longer joint-family property, and a suit to recover it does not fall under this Article—*Ahmed Ali v. Hussain Ali*, 10 All. 109 (114). Where the greater portion of the properties has been divided and the parties live separately, i.e. where the family has been

divided in status), and then a member recovers a debt due to the family (which was left undivided at the time of partition), the debt so recovered is not the property of a joint family and a suit to recover a share therein is not governed by this Article—*Vaidyanatha v. Aiyasamy*, 32 Mad 191 (194); *Thakur v. Partab*, 6 All. 442; *Banoo v. Doona*, 24 Cal. 309 (315); *Yerakola v. Yerakola*, 45 Mad. 648; *Gajraj v. Sadho*, 15 O.C. 397, 16 I.C. 882 (883). Where, however, at the time of partition, one of the members is a minor and continues undivided from and under the guardianship of another, who afterwards collects certain debts due to the family, it will not be open to the guardian to say that he did not realise the minor's share of the debt on his behalf, as it was his duty to protect the minor's interests and he would have been guilty of dereliction of duty if he had omitted to do so. Where, therefore, he collects any such debts, he will be considered to have recovered the minor's share on behalf of such minor, and the minor can recover his share within the period provided by Art. 127—*Vaidyanatha v. Aiyasamy*, 32 Mad. 191 (199).

Where money belonging to the joint family was realised by one member of the family, to the exclusion of the other members, while the family was joint, and then a partition was effected by the members, a suit for recovery of the money, brought *after partition* is not governed by Article 127 because it is no longer joint family property. The suit ought to be instituted within three years from the date of separation or partition—*Jagat Singh v. Achharbar*, 26 O.C. 191, A.I.R. 1922 Oudh 15 (following *Gajraj v. Sadhu*, 15 O.C. 397, 16 I.C. 882). The members of a joint-family made a partition of family property, reserving certain land and the capital and assets of their family businesses, which remained under the control and in the possession of one of the members, for future partition. The plaintiff who was a member of the family demanded his share in the undivided property but the person in possession refused to give effect to his claim. He thereupon sued for his share. *Held* that the property in question was undivided coparcenary property notwithstanding the partition, and the suit fell under this Article and time ran from the date of refusal and not from the date of the previous partition—*Muthusami v. Nallakulantha*, 18 Mad. 418 (419). See also *Ramachandar v. Narayana*, 11 Bom. 216 (219).

A suit to obtain a share by partition of a joint family property, the interest of the plaintiff's father having been sold in execution of a decree, falls under this Article, and time ran from the date of attachment of the property in as much as the plaintiff became aware of the alleged exclusion from that date—*Issuridutt v. Ibrahim*, 8 Cal. 653 (655).

If the property is joint family property, the suit for possession of a share in such property falls under this Article, and not under the general Article 142—*Umesh Chandra v. Jagadish*, 1 C.W.N. 543 (544).

532. Muhammadan family property :—The words "joint family property" in this Article mean the property of a joint-family and not property which, although it may not have been divided, yet belongs to a family which is not joint, and hence this Article does not apply to

the undivided property of a family governed by the Mahomedan law, because each member thereof holds his share in severalty—*Amme Raham v. Zia Ahmed*, 13 All. 282 (F.B.). So also, in *Mohideen v. Syed Meer Saheb*, 38 Mad. 1099, *Patcha v. Mohidin*, 15 Mad. 57, *Commercial Bank v. Allavooddeen*, 23 Mad. 583 (589) and *Imbichi v. Syed Ali*, 1912 M.W.N. 45, 13 I.C. 791, it has been held that this Article refers to 'joint-family property' in the Hindu sense of the term and is inapplicable to Mahomedans. If the members of a Muhammadan family succeed to the property on the death of a relation, each of them takes a share of each item of the property; and the article of the Limitation Act which would apply to a suit for a share would be Article 123 which deals with a suit for distributive share of the property of an intestate—*Mohideen v. Syed Meer Saheb*, 38 Mad. 1099 (1101). This Article does not apply to a suit by Mahomedans for possession by right of inheritance of shares in the property of their deceased ancestor—*Mahomed Akram v. Anarbi*, 22 Cal. 954; *Lakhu Khan*, 7 C.W.N. 155.

The Bombay High Court in an earlier case (*Bavasha v. Masumsha*, 14 Bom. 70) held that this Article applied to a suit by a Mahomedan for partition of joint-family property; but now it holds to the view that this Article does not apply to the property of a Muhammadan, or any other person not being a Hindu, and not having been proved to have adopted as a custom the Hindu law of joint-family—*Ishop Ahmed v. Abhramji*, 41 Bom. 588 (F.B.) (Shah J. dissenting), *Jan Mahomed v. Dutta Jaffer*, 38 Bom. 449, 22 I.C. 195.

533. "Excluded".—The word 'excluded' has not been defined in this Act, and the question whether a person has been excluded from the joint family must depend upon the facts of the particular case. An intention to exclude is an essential element, and it is necessary for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude the person, and the exclusion was to his knowledge. Thus, one N, a member of a joint Hindu family, after the death of his father and mother, at the age of 12 went to live with his maternal uncle voluntarily. He was not turned out, but went away to avoid his hostile stepmother, and with the consent of the eldest male member of the joint family. He was helped by his maternal uncle but was not educated in the same way as the other members of the joint family. Held that the mere fact that the member of the joint family did not subscribe towards his education and marriage expenses and allowed him to be poorly maintained by his maternal uncle did not prove that N was excluded from his share of the joint family property, when there was nothing to indicate to N or to anyone else that they intended to exclude him from his share—*Radhoba v. Aburao*, 53 Bom. 699 (P.C.), 56 I.A. 316, 27 A.L.J. 1031, 31 Bom. L.R. 1030, 33 C.W.N. 1006 (1013, 1014), 57 M.L.J. 287, A.I.R. 1929 P.C. 231, 118 I.C. 1.

The sole occupation of the joint property by some of the members will not amount to ouster of the rest of the members or adverse possession.

To entitle a person or a branch of an Aliyasantana family to participate in the property of the family, the connection with the family must be kept up either by exercise of the right to share in the joint family property by joining in the *sacra*, by intermarriage or otherwise. But when they have kept themselves completely separate from the family more than 12 years, that will amount to evidence that they were excluded from the joint family and consequently their right to share therein is barred—*Muttakke v. Thimmappa*, 15 Mad. 186 (192).

534. When time runs :—Time would not run against the plaintiff until his exclusion from the property had become known to him, i.e., until there has been a disclaimer of the plaintiff's title by the open assertion of a hostile title by the defendant with notice to the plaintiff—*Ittappan v. Manavikrama*, 21 Mad. 153; *Ujalbai v. Umakanta*, 31 Cal. 970; *Barada Sundari v. Sarada Sundari*, 3 C.W.N. 774; *Hari v. Maruti*, 6 Bom. 741; i.e., unless the plaintiff had intimation that the defendant intended to exclude him—*Malkappa v. Madkappa*, 37 Bom. 84; *Umrao v. Lachmi*, 1917 P.L.R. 25, 39 I.C. 762. Thus, the mere fact that the defendant had been in possession of the property in dispute for more than fifteen years, without any claim having been made by the plaintiff would not make the defendant's possession adverse, and time would not run against the plaintiff until he demanded a share of the property and was refused—*Hari v. Maruti*, 6 Bom. 741 (742). Where there is no allegation by the defendant that the plaintiff ever claimed and was refused his share in the family property, a suit by the plaintiff to establish his right to a share in the joint family property cannot be barred by any lapse of time—*Hansji v. Valabh*, 7 Bom. 297 (299).

In case of a minor, the suit is not barred if brought within 12 years of his attaining majority, because at the most it can be held that he became aware of his exclusion when he became a major—*Niranjan v. Behari*, 27 A.L.J. 324, A.I.R. 1929 All. 302 (305), 116 I.C. 849.

535. Burden of proof :—In a suit under this Article, it is necessary for the plaintiff to prove title, i.e., to prove that the property is joint and that he has a share in it—*Jibanbhat v. Anibhat*, 22 Bom. 259 (260). The burden lies on the plaintiff to prove that the property in which he seeks to recover a share is a joint family property. It is not enough for him merely to call it joint family property and to show that 30, 50 or 100 years ago his ancestors and the defendant's ancestors were joint, leaving the Court to presume that any property of which the defendant may be possessed at the time of suit is joint family property—*Obhoy v. Gobin*, 9 Cal. 237 (241); *Gajraj v. Sadho*, 15 O.C. 397, 16 I.C. 882 (883).

The point of time at which the status of the joint family broke and the members became separated is very material, and the onus lies on the plaintiff to show that the partition at which the shares of the members of the family were determined and in consequence of which the plaintiff

became entitled to possession of his share, took place within 12 years preceding the institution of the suit—*Sarjoo Prosad v. Deodat*, 4 O.W.N. 958, A.I.R. 1927 Oudh 499, 105 I.C. 410

As regards *exclusion*, the burden lies on the defendant to show that partition was demanded by the plaintiff and refused by the defendant more than twelve years before suit, or that the plaintiff was to his knowledge excluded from all participation in the family property more than twelve years before suit—*Krishnabai v. Khangowda*, 18 Bom. 197 (202); *Hansji v. Valabh*, 7 Bom. 297, *Sellam v. Chinnammal*, 24 Mad. 441 (443). It would not be sufficient to prove merely that the plaintiff was excluded; it must also be proved that the exclusion was known to the plaintiff more than twelve years before suit—*Jibanbhat v. Anibhat*, 22 Bom. 259 (261); *Umesh v. Jagadis*, 1 C.W.N. 543 (544).

536. Effect of fraud:—Where a Court finds that a partition effected between the co-parceners of a joint family was unfair and inequitable, or one of the co-parceners had been deceived, the case is reduced to one of fraudulent partition, and the cause of action for a suit for partition is then in substance to set aside that partition on the ground of fraud and to treat the family as joint and to seek for a fresh partition of the family estate. For the purpose of limitation such a case is taken out of this Article—*Vithapa v. Basagowda*, 14 Bom. L.R. 771, 17 I.C. 10.

**128.—By a Hindu for Twelve When the arrears are
arrears of mainten- years. payable.
ance.**

537. This Article and the next apply only to cases in which the right of maintenance is based upon the Hindu Law, and not to cases in which the right is based entirely upon a *contract*, though the persons claiming under the contract are Hindus; and the application of these two Articles depends not upon the nationality of the plaintiff but upon the nature of his right, and the words "by a Hindu" used in the Article must be taken to mean "by a person claiming under the Hindu Law"—*Girijanund v. Sailajanand*, 23 Cal. 645. Therefore where the plaintiff's claim to maintenance was based upon a contract evidenced by a compromise-decree, her case was not governed by Article 128 but by Art. 115—*Narendra v. Nalini*, 26 I.C. 939 (Cal.)

Where maintenance was charged upon immoveable property, a suit to recover the arrears of maintenance would be governed by Art. 132—*Ahmed Hossain v. Nihaluddin*, 9 Cal. 945 (951) (P.C.).

The right to maintenance is one accruing from time to time according to the wants and exigencies of the person claiming it—*Narayanarao v. Ramabai*, 3 Bom. 415 (P.C.) It is a constantly recurring right and therefore arrears can be claimed for 12 years before suit although arrears for previous years may be barred—*Jivi v. Ramji*, 3 Bom. 207.

129.—By a Hindu for a Twelve When the right is declaration of his years. denied.
right to mainten-
ance.

538. A suit for maintenance by a junior member of an *Aliyasantana* family is one that falls under Article 127, because it is a suit to enforce a right to share in joint family property (the right to maintenance being the mode in which the right of ownership is enforced); it does not fall under Article 129 because this Article applies to suits which are strictly for a right of maintenance in property belonging to another—*Maradevi v Pamakar*, 36 Mad. 203 (206), *Achutan v Kunjnni*, 13 M.L.J. 499.

So long as there is no denial of the right, limitation does not run in respect of a suit to establish the right, although there may have been no payment or claim made—*Ramanamma v. Sambayya*, 12 Mad. 347.

Reading Articles 128 and 129 together, it is obvious that though the right to maintenance may have been denied long before twelve years of the date of suit (Art 129), a suit for recovery of arrears of maintenance for 12 years preceding the suit can be maintained—*Ratnamasari v Akilandammal*, 26 Mad. 291 (313)

In a suit under this Article, the *onus* of proving the denial of the plaintiff's right to maintenance more than twelve years prior to suit lies on the defendant—*Rangappa v. Kulandai*, 26 M.L.J. 205, 23 I.C. 831.

130.—For the resump- Twelve When the right to re-
tion or assessment years. sume or assess the
of rent-free land. land first accrues.

539. A suit for assessment of rent-free land is governed by Article 130, but a suit to establish a right to assessment of rent is governed by Article 131—*Devendra v Jhumur*, 43 C.L.J. 387, A.I.R. 1926 Cal 883, 95 I.C. 622 The period of limitation for a suit for resumption of a jaghir granted, for life commences from the death of the grantee—*Mahadev v. Jagatraj*, A.I.R. 1924 Pat 298, 71 I.C. 929.

The period of limitation for a suit for assessment of rent runs from the time when a complete hostile right to hold the land rent-free has been claimed by the defendant to the knowledge of the plaintiff—*Birendra v. Roshan*, 39 Cal 453, *Devendra v. Jhumur*, *supra* Thus, in a suit to recover khas possession or in the alternative for assessment of rent it appeared that the defendant had in a settlement proceeding more than 12 years before the suit, set up a claim to hold the land rent-free in virtue of his ancestral title, held that this was a clear claim of *nishkar* title unqualified by any reference to a document; a complete hostile right had been claimed to the knowledge of the plaintiff, and the present suit was therefore barred—*Birendra Kishore v. Roshan Ali*, 39 Cal. 453 (456).

If the right to resume or assess the land first accrued to the plaintiff, who had purchased the estate at a revenue-sale, on the date of the revenue

sale, a suit by the plaintiff to resume the land from the *lakhirajdar* or for assessment of the land falls under Art. 130, and must be brought within twelve years of the revenue-sale, that being the date on which the right to resume or assess the land accrues. But if the defendant had been claiming to hold the land as *lakhiraj* adversely against the old proprietors, for more than twelve years before the institution of the plaintiff's suit, the plaintiff would be barred by limitation—*Karmi v. Brojo*, 22 Cal. 244 (251). In a suit to assess rent on a land granted rent-free to the tenants for excavating a tank therein, time begins to run when the right to assess the rent accrues, *i e.*, when there is a clear and unequivocal assertion of adverse possession by the tenant, or when the tank becomes silted up and is no longer used for the purpose for which the land was granted—*Birendra v. Akram*, 39 Cal. 439 (445). Moreover, as the obligation to pay rent is a recurring obligation, the landlord cannot be barred by Article 130—*Ibid* (at p. 446). If the right to assess the land is created by a decree declaring the land to be liable to assessment, a suit to recover assessment of the land must be brought within 12 years of the date of the decree; otherwise it will be barred—*Bir Chunder, v. Raj Mohun*, 16 Cal. 449 (456), *Nil Komal v. Bir Chunder*, 16 Cal. 450 (Note).

Article 130 can have no application unless and until the land is found to be rent free, the mere non-payment of rent for a period does not bar the landlord's right to have the rent assessed and to recover rent from his tenant. Where the suit is not for resumption or assessment of rent-free land, but for the assessment of *mal* land presumably liable to be assessed, the circumstance that rent has not in fact been paid for more than 12 years before suit is not a sufficient ground for dismissal of the suit, because the right to have the rent assessed continues as long as the relationship of landlord and tenant continues in respect of the land liable to be assessed—*Akbar v. Ramesh Chandra*, 38 C.L.J. 207, A.I.R. 1923 Cal. 392, 72 I.C. 329; *Kamini Sundari v. Abdul Halim*, 28 C.L.J. 254, 47 I.C. 420, *Dhananjoy v. Upendra*, 22 C.W.N. 685, 46 I.C. 428.

A suit to levy assessment on rent-free lands being virtually a suit for possession of those lands, if a suit for assessment of land is barred by Article 130, the right to receive rent in respect of the land is extinguished by operation of sec. 28, and the tenant's title to hold the land rent-free is complete—*Sakharam v. Trimbakrao*, 45 Bom. 694 (708), *Abhoy Churn v. Kally Pershad*, 5 Cal. 949 (952), *Madhav Rao v. Anusuyabai*, 40 Bom. 606 (613); *Birendra v. Dilnar*, 13 I.C. 517 (Cal.); *Keval Kuver v. Taluqdari Settlement Officer*, 1 Bom. 586 (590). Where a tenant has for over twelve years asserted to the knowledge of the landlord that he is under no obligation to pay rent, the claim to assessment of rent is barred—*Birendra Kishore v. Lakshmi*, 22 C.L.J. 129, 30 I.C. 896; *Kali Mohan v. Birendra Kishore*, 22 C.L.J. 309, 31 I.C. 391.

If a land is found as not included in the admitted tenancy, it must be a case of encroachment or trespass by the tenant. In such a case, if the tenant is in adverse possession of the absolute interest for over twelve years, then the landlord's right should be held to be completely extin-

guished. If the tenant is in adverse possession for such a period in respect of only a limited interest as tenant, then whatever may be the effect of it on the question of the landlord's right to khas possession, a claim for assessment of rent will not be barred, unless as provided for in Article 130 or 131—*Debendra v. Jhumur*, 43 C.L.J. 387, A.I.R. 1926 Cal. 883, 95 I.C. 622.

Twelve years' adverse possession against one holder of *saranjam* would operate to bar a claim on the part of a successor—*Madhavrao v. Anusuya-bai*, 40 Bom. 606.

131.—To establish a Twelve When the plaintiff is periodically recur- years. first refused the en-
ring right. joyment of the right.

540. Scope of Article :—According to the Madras High Court, a suit to recover money due by reason of a periodically recurring right falls under this Article, as there is no other Article specifically providing for such a suit. The use of the word 'establish' and the fact that there is only one Article in the case of a suit with reference to a periodically recurring right, and not two, as in the case of suits based on rights to maintenance (see Arts 128 and 129) indicate that the Legislature intended that this Article would govern suits to obtain an adjudication as to the existence of a periodically recurring right as well as suits to recover money due under that right. If the Legislature had intended to confine the Article to the former kinds of suits only, it would have used the words "to obtain a declaration" (*cf.* Article 129) and not the word 'establish'—*Zamrin of Calicut v. Achutha*, 38 Mad. 916 (921) F.B. In another Madras case, *Ratnamasari v. Akilandammal*, 26 Mad. 291 (313, 314) although the scope of Article 131 was not in issue, still Bhashyam Ayyangar J in the course of his judgment remarked that Article 131 was not confined to a declaratory suit but would also include a suit for arrears due in respect of a periodically recurring right. In this case also it was pointed out that the expression used in this Article was not "for a declaration" but "to establish" which term would include a suit for a declaration as well as a suit to recover arrears of amount due. So also, in another case, where the suit was not for a declaration of a recurring right but for recovery of the actual amount payable thereunder it was held that the plaintiff was entitled to recover twelve years' arrears up to the date of suit, under Article 131—*Alubi v. Kunhi Bi*, 10 Mad 115 (117). The above Full Bench decision overrules the case of *Balkrishna v. Secretary of State*, 16 Mad. 294 (295), in which it was laid down that this Article applied only to cases in which a decree for some consequential relief was sought for by virtue of the periodically recurring right, and that if only a declaration of the right was sought, the suit fell not under this Article but under Article 120. In *Ramnad Zamindar v. Dorasami*, 7 Mad 341 (343), where the suit was only for a declaratory decree, and not for any consequential relief, it was held that Article 131 applied.

But it has been held by the Allahabad High Court and the Punjab Chief Court that the words "to establish" do not extend and cannot be

extended to cases in which the plaintiff seeks to recover specific sums of money due to him in respect of a periodically recurring right—*Luchmi v. Turab*, 34 All. 246 (248); *Dost Muhammad v. Sohan*, 83 P.R. 1906. The Patna High Court also agrees with the view of the Allahabad High Court, viz., that 'to establish' means 'to obtain a declaration of' and lays down that there is a vast distinction between a suit brought to establish a periodically recurring right and a suit brought to enforce payments due as remuneration for the performance of services arising out of that right. From a perusal of Articles 128 and 129, one of which applies to a suit for arrears of maintenance and the other by a Hindu for a declaration of his right to maintenance, it is clear that the framers of this Act had clearly in mind the distinction between a suit for declaration of a right and a suit claiming arrears of remuneration arising out of that right, and had it been the intention to include both classes of suits under Article 131, the legislature would have used words appropriate to that effect. Article 131 has been intentionally drafted so as to include merely a suit to establish (i.e., to obtain a declaration of) a right—*Sri Sri Baidyanath Jiu v. Har Datt*, 5 Pat. 249, 7 P.L.T. 465, 94 I.C. 826, A.I.R. 1926 Pat. 205.

This Article does not refer to a periodically recurring liability, but is concerned with a periodically recurring right only—*Khanderao v. Ravji*, 1 Bom L.R. 373.

541. Periodically recurring right—Instances :—

(1) A right to receive burial fees whenever a corpse is brought to the burial ground for burial—*Bahar v. Pero*, 24 W R 385,

(2) A right to *palla* or turn of worship of an idol for a certain period during the year—*Gopeekishen v. Thacoordas*, 8 Cal. 807, *Eshan v. Mon-mohini*, 4 Cal. 683,

(3) A right to receive a monthly allowance from a Zemindary—*Ramnad Zemindar v. Dorasami*, 7 Mad 341,

(4) a right to a share in an annual allowance from the Government—*Raoji v. Bala*, 15 Bom. 135,

(5) a right to receive a yearly payment out of the income of certain immoveable property, which right has been settled by arbitration in the course of a suit—*Gajpat v. Chimman* 16 All 189 (190) following *Chagan Lal v. Bapubhai*, 5 Bom 68,

(6) a right to recover rent—*Mohammad Husain v. Muhammad Bibi*, 13 A.L.J 333, *Jagannatha v. Muthia*, 14 M L J 477, *Alubi v. Kunhi*, 10 Mad. 115,

(7) a right to recover additional rent for increased area—*Jatindra v. Chandra*, 6 C.W.N 360;

(8) a right to a share in a pension—*Sahibunnissa v. Hafiza*, 9 All. 213;

(9) a right to a *fardak* allowance due to the plaintiff's temple from the defendants' temple from year to year—*Sakharani v. Laxmipriya*, 34 Bom. 349;

(10) a right to a share in an allowance attached to a *deshpande vata*—*Keshab v. Narayan*, 14 Bom. 236;

(11) a right to receive certain sums in perpetuity as *dasturat*—*Hem Chandra v. Atul Chandra*, 19 C.W.N. 386, 21 I.C. 179, 19 C.L.J. 118

(12) a right to payment of *dhara* or assessment of customary rent—*Ganesh v. Sitabai*, 41 Bom. 159,

(13) a right to certain shares in the offerings of a temple—*Jagdeo v. Mathura Prasad*, 22 O.C. 346,

(14) a right to enhanced rent—*Brij Behari v. Sheo Shankar*, 2 P.L.J. 124, 39 I.C. 85;

(15) a right to receive *lawajama* allowance—*Nazar Ali v. Akaji*, 109 I.C. 85.

A right to receive *malikana* annually is a periodically recurring right, and a suit to establish the periodically recurring right, pure and simple, falls under this Article, if it is treated as a suit for possession of an interest in immoveable property, the proper Article applicable would be Article 144. But where in the suit to establish a right to receive *malikana* annually, there is involved a further claim, because that right carries with it a right to the property itself, it cannot be said that it is purely a suit to establish a periodically recurring right. It may fall under Article 120—*Gopi Nath v. Bhugwat*, 10 Cal. 697 (708).

A perpetual right is not the same thing as a periodically recurring right. A claim that the plaintiff is the *mutwali* of a mosque and as such is entitled to all yeomiah allowances received by a rival claimant, amounts to a perpetual right to receive the allowances, and the fact that the sums of money are paid periodically does not make the right a periodically recurring right. Where the right is always vested in some persons to receive periodical payments, and being vested in one person at one time passes away at another time to some body else, such a right is a periodically recurring right in the true sense of the term—*Gulam Ghouse v. Janni*, 39 M.L.J. 492, 58 I.C. 788. A right to worship an idol for a sixth part of every year is a periodically recurring right, governed by this Article, but an exclusive right to worship an idol is not a periodically recurring right but falls under Article 120—*Eshan v. Monmohini*, 4 Cal. 683 (685).

A suit for a declaration that the Zemindar is not entitled to recover from the tenant (plaintiff) any amount in excess of a stated sum by way of quit rent, is not a suit to establish a periodically recurring right—*Sriman Madhabusi v. Gopiseti*, 33 Mad. 171 (172).

542. Arts. 62 and 131:—In a suit to recover the arrears, the important question is—who is the person sued? There is a distinction between the person originally liable to pay and a co-sharer of the plaintiff who has actually received payment from that person. If the defendant is the person originally liable to pay, Art. 131 applies; if however the money is sought to be recovered from a co-sharer who has received the payment,

then it is a suit for money received by the defendant for the plaintiff's use, and Art. 62 applies—*Sakharam v. Laxmipriya*, 34 Bom. 349, 12 Bom. L.R. 157, *Harmukhgaury v. Harisukhprasad*, 7 Bom. 191 (193); *Desai Maneklal v. Shivalal*, 8 Bom. 426 (432), *Dulabh v. Bansidhar*, 9 Bom. 111; *Raoji v. Bala*, 15 Bom. 135; *Chamanlal v. Bapubhai*, 22 Bom. 669. This principle was overruled in *Chaganlal v. Bapubhai*, 5 Bom. 68.

543. Demand and refusal :—There must be definite demand and refusal. The mere omission on the part of the person having the right to exercise it will not start a period of adverse possession under this Article—*Ganesh v. Sitabal*, 41 Bom. 159 (162), 38 I.C. 54, 18 Bom. L.R. 950. The mere fact of the plaintiff's exclusion from enjoyment of his right for 12 years before suit would not bar his claim, unless it were shown that such exclusion was the result of refusal made upon a demand—*Raoji v. Bala*, 15 Bom. 135; *Devendra v. Jhumur*, 43 C.L.J. 387, A.I.R. 1926 Cal. 883, 95 I.C. 622; *Hem Chandra v. Atul*, 19 C.W.N. 386, 21 I.C. 179, 19 C.L.J. 118. A mere refraining of the plaintiffs from demanding the right does not give a start to the period of limitation, it will run from the time when they were first refused the enjoyment of the right—*Kamman v. Budh Singh*, 146 P.R. 1882, *Zinat v. Martaza Khan*, 108 P.R. 1901. Mere non-collection of the *Kattubadi* for a period of 12 years does not amount to a denial of the landlord's right to collect the same—*Jalasutram v. Bommadevara*, 29 Mad. 42 (43). Where the right to the revenue of a certain land had been granted to the trustees of a temple, the fact that no revenue was thereafter paid to the trustees by the owners of the land would not bar the suit of the trustees to recover arrears of revenue, when it was found that the owners of the land *did not deny* that they were liable to payment of revenue to the persons entitled to claim it. The trustees could recover 12 years' arrears under this Article—*Alubi v. Kunhi*, 10 Mad. 115 (117). Mere non-payment of rent or assessment does not amount to a denial of the landlord's right to recover assessment. There must be some overt act, such as refusal to pay the rent or assessment, before time begins to run—*Bhimabai v. Swami Rao*, 45 Bom. 638 (646); *Akbar v. Ramesh Chandra*, 38 C.L.J. 207, 72 I.C. 329, A.I.R. 1923 Cal. 302.

The refusal must be distinct and made against the plaintiff himself. Where in answer to a demand made by a member of the class to which the plaintiff belonged, a member of the class to which the defendant belonged made a *general denial* of the right of the plaintiff's class, such denial did not amount to a refusal of the right of the plaintiff—*Ramnad Zemindar v. Dorasami*, 7 Mad. 341 (343).

A mere omission, on the part of a person having a right to assess the land, to exercise that right, will not start a period of adverse possession. So that, if an inamdar continues to receive per annum certain fixed rent from his tenants for 60 years, and has made no demand for the actual assessment in excess of the amount which the tenants had all along paid, that fact would not debar him from claiming assessment if he chose to do so; but once he claims assessment and the right to claim

assessment is denied by the tenant, limitation begins to run against the inamdar—*Shri Bala v. Sakharam*, 28 Bom. L.R. 633, A.I.R. 1926 Bom. 345, 95 I.C. 851.

Where the plaintiff asserts that there has been no demand and refusal within 12 years before suit, the *onus* is on the defendant to prove that the plaintiff has made a demand and that the defendant has refused—*Hemchandra v. Atul*, 19 C.W.N. 386, 21 I.C. 179, 19 C.L.J. 118. Where the plaintiff is one of a family upon the members of which in turn devolves the performance of the duties of an office, it must be shown that the plaintiff's turn to perform the duties and receive the emoluments of the office occurred within 12 years before the suit was brought, and that he was then refused the enjoyment of his right—*Sinde v. Sinde*, 4 B.H.C.R., A.C. 51.

The above rule, *viz.*, that the period of limitation would run only where there has been a definite demand and refusal, should be limited to cases where the circumstances are such that the mere non-compliance with the right does not amount to a refusal. Thus, in 1874, the defendant purchased at a Court sale the title and interest of the then inamdar, and since then had been in possession of the property; and no attempt was made by the inamdar or his successors to levy assessment or to recover possession until 1916, when the plaintiff as inamdar sued to recover assessment from the defendant. *Held* that the suit was barred. In such a case it was not necessary that there should be a definite demand before the period of limitation would begin to run, because the circumstances were such that the non-payment of any rent or assessment by the defendant to the plaintiff necessarily constituted a refusal within the meaning of the Article. If the relationship of landlord and tenant had ever existed between the parties, a demand would have been necessary before the period of limitation could run. But no such relationship ever existed in this case. Therefore, the plaintiff was first refused the enjoyment of his right in 1874, and the suit was barred. It should be noted that under the 3rd column, limitation runs from the time when the enjoyment of the right is first 'refused,' and not when the enjoyment of the right is first 'demanded and refused,' as in Article 88, 89 and 103. The word 'demanded' has been deliberately omitted, so that where the defendant's act of non-payment of assessment amounts to a refusal irrespective of demand, limitation runs from the non-payment—*Bhimabhai v. Swamirao*, 45 Bom. 638 (647, 648), 23 Bom. L.R. 100, A.I.R. 1921 Bom. 175, 60 I.C. 892.

The right to levy assessment as a recurring right would accrue when there has been a demand and a refusal, only in those cases where the relationship of landlord and tenant or landlord and occupant had ever existed. Once that right is established, then the non-payment of rent or assessment would not be sufficient to enable the tenant to begin to set up a title by adverse possession. There must be some overt act, such as refusal to pay the rent or assessment, before time begins to run—*Akbar v. Ramesh Chandra*, 38 C.L.J. 207, A.I.R. 1923 Cal. 302, 72 I.C. 329.

544. Effect of bar of limitation :—A suit to establish a periodically recurring right must be brought within 12 years from the time when the plaintiff is first refused the enjoyment of his right; and if it is not brought within that time, not only is the right itself barred but any cause of action the plaintiff may have to recover arrears which rests on such right is also barred. If a plaintiff recovers in a suit arrears of periodical payments but apparently without a declaration that he has a right to such payments for the future, and then makes no claim for more than 12 years, any subsequent suit for the arrears of such periodical payments would be barred—*Shivram v Secretary of State*, 11 Bom 222 (233).

**132.—To enforce pay- Twelve When the money sued
ment of money years. for becomes due.
charged upon im-
moveable property.**

Explanation.—For the purposes of this Article—

- (a) the allowance and fees respectively called malikana and haqq, and
- (b) *the value of any agricultural or other produce the right to receive which is secured by a charge upon immoveable property, and*
- (c) *advances secured by mortgage by deposit of title-deeds*

shall be deemed to be money charged upon immoveable property.

Change .—Clause (b) of the Explanation has been added by the Indian Limitation Amendment Act 1927 (Act 1 of 1927). The effect of this amendment has been noticed in Note 545 below

Clause (c) has been very recently added by the Transfer of Property Amendment Supplementary Act (XXI of 1929) See Note 558 below.

545. Money—agricultural produce :—Where loan was taken of paddy and promised to be returned in money (as the price of paddy) and the mortgage-bond provided that on the expiry of the period mentioned in the bond the creditor would be entitled to recover the price of paddy with interest by sale of a property given as security for the repayment of the loan, held that money was charged upon immoveable property in as much as the mortgagee was entitled to recover money and not specific paddy; and to such a case Art 132 applies—*Indra Narain v. Dwijabar*, 47 Cal 125, 23 C.W.N. 949, *Jogendra v Mohan Lal*, 23 C.W.N. 951; *Mohesh v. Umesh*, 51 I.C 241 (Cal), *Sridhar v. Ram Gobinda*, 29 C.L.J. 368, *Dinabandhu v. Bishnu*, 32 C.L.J. 221; *Sripati v. Sarat*, 22 C.W.N. 790; *Rarichand v. Iswarchandra*, 48 Cal 625, 632 (F.B.), 25 C.W.N. 57, 32 C.L.J. 278. In *Joy Narain v. Mangobinda*, 64

I.C. 210 (Cal.) and *Shamlal v. Dhanwa*, 18 N.L.R. 111, A.I.R. 1922 Nag. 23, it has been held that even where loan is taken of paddy and promised to be returned in paddy (with an additional quantity of paddy as interest), the suit to enforce the security falls under this Article, because the mortgagee is entitled to claim the value of the grain in case of its non-payment, and the mortgagor is entitled to pay the value of the grain, instead of the grain itself; the mortgagee is not entitled to claim, nor is the mortgagor bound to deliver, grain; consequently it is the money value of the grain debt that is really charged upon immoveable property.

But in a Calcutta case, where loan was taken of paddy and was promised to be returned with interest in paddy, a suit to realise the value of the paddy due by sale of the immoveable properties given as security for the repayment of the loan, was held not to be governed by Art. 132 (but by either Art 116 or Art. 120) as the suit could not be treated as a suit to enforce payment of money charged upon immoveable property—*Rashbehari v. Kunjabehari*, 24 C.L.J. 348. This case is no longer good law; vide clause (b) of Explanation.

This clause has been added on the recommendation of the Civil Justice Committee: "Article 132 has not been applied by some judges to cases in which not money specifically, but something which can be valued in money, such as grain, is charged on the immoveable property. Not infrequently in Hindu families, maintenance is allotted to female members in the shape of a grain from a particular parcel of land, and the maintenance is charged on that land. Money-lending cases are not uncommon in which money is repayable in grain and the obligation is charged upon property described in the instrument. There has been difference of opinion whether Article 132 applies to these cases, and after some conflict of opinion it has now been held in Calcutta, that, a suit to recover the value of paddy charged upon immoveable property comes within Article 132 (see 25 C.W.N. 57, F.B.). The matter is one which should be made clear by the amendment of the statute itself"—*Civil Justice Committee Report*, p. 495.

546. Immoveable property.—A tree, for the purpose of limitation, comes within the meaning of immoveable property as used in Art. 132, though for the purpose of registration it does not—*Kangal v. Naoli*, 9 I.C. 478; *Ram Gulam v. Monohar Das*, 1887 A.W.N. 59.

A decree is moveable property, and a suit to enforce the hypothecation of a decree is governed by Art. 120. But where the decree is converted into immoveable property, that is, where the mortgagor-decreeholder purchases certain immoveable property of his judgment-debtor in satisfaction of the decree, the mortgagee is entitled to the substituted security and also to the larger period of limitation provided by this Article—*Jamna Dei v. Lala Ram*, 39 All. 74 (78).

Money charged upon rents and profits of an estate is money charged upon 'immoveable property'; the rents and profits, which in English law are classed as incorporeal hereditaments, are by the law in India included as immoveable property—*Muhammad Zakl v. Chatku*, 7 All. 120.

A *nankur* allowance payable out of the profits of a particular village is treated as money charged upon the village, and is therefore money charged upon immoveable property within the meaning of this Article—*Ram Juwan v. Jadu Nath*, 18 O.C. 380, 33 I.C. 555, *Deputy Commissioner v Jaginwan*, 19 O.C. 49, 33 I.C. 461.

A hypothecation of *jaghir* income is a charge upon immoveable property, because the *jaghir* income is a benefit to arise out of land within the terms of the definition of immoveable property as given in the General Clauses Act—*Ram Pershad v. Kishen*, 4 P.R. 1894.

A *pala* or turn of worship is *moveable* and not immoveable property, consequently a suit to enforce a mortgage of a *pala* is not governed by this Article but by Article 120—*Narasingha v. Prothadman*, 46 Cal 455 (457).

547. To enforce a charge :—This Article applies to suits to recover money charged on immoveable property, by sale of that property; it is inapplicable to a suit to recover money personally from the defendant, even though the money be charged on the property—*Ram Din v. Kalka*, 7 All. 502, 506 (P.C.), *Miller v. Runga Nath*, 12 Cal. 389, *Chunilal v. Bal Jethi*, 22 Bom. 846, *Lachmi Narain v. Turabunnissa*, 34 All. 246 (248); *Rathnasami v. Subramania*, 11 Mad. 56; *Khub Lal v. Padmanund*, 15 Cal. 542; *Sitab Chand v. Hyder*, 24 Cal. 281 (1282); *Seshayya v. Amanna*, 10 Mad. 100, *Maharaja of Vizianagram v. Sitaram*, 19 Mad. 101 (103), *Devi Das v. Ishar Das*, 55 P.R. 1884, *Chattar Mal v. Thakuri*, 20 All. 512 (516) [In view of the Privy Council decision in 7 All. 502, the ruling in *Lallubhai v. Naran*, 6 Bom. 719 (F.B.) is no longer good law. In this Bombay case it was held that a suit by the mortgagee to recover, by a personal decree against the mortgagor, the money secured by the mortgage, was a suit to enforce payment of money charged upon immoveable property, and the period of limitation was 12 years.]

In this respect the law in India differs from the English law; for according to the law in England (under sec. 8 of the Real Property Limitation Act) the limitation of 12 years applies equally to actions for the recovery of money charged on the land by a personal remedy against the mortgagor, as well as to suits to recover the money by the remedy against the land—*Sutton v. Sutton*, (1882) 22 Ch. D. 511.

548. Simple mortgage —A suit on a simple mortgage-bond to enforce payment of the money due on the bond by sale of the mortgaged property is governed by this Article and not by Article 147—*Vasudev v. Srinivasa*, 30 Mad. 426 (P.C.), *Girwar Singh v. Thakur Narain*, 14 Cal. 730 (F.B.); *Nilcomal v. Kamini*, 20 Cal. 269; *Sitab Chand v. Hyder*, 24 Cal. 281; *Balaram v. Mangta*, 34 Cal. 941 (945), *Ramchandra v. Madhupadhi*, 21 Mad. 326 (F.B.); *Rangaswami v. Muthukumarappa*, 10 Mad. 509 (F.B.); *Ramsaran v. Mehtab*, 112 P.R. 1890 (F.B.). [The following decisions have been overruled by the Privy Council case :—*Shiblal v. Ganga Prosad*, 6 All. 551; *Motiram v. Vithal*, 13 Bom. 90; *Onkar Ramshet v. Govardhan*, 14 Bom. 577; *Venkatesh v. Narayana*, 15

Bom. 183, *Datto Dudheshwar v. Vithu*, 20 Bom. 408; *Khurshed Ali v. Ram Dayal*, 3 O.C. 156, *Chasiram v. Dunichand*, 2 C.P.L.R. 57.]

English mortgage :—An English mortgage was held to be governed by Art. 147; that Article applied to that one class of mortgage in which a suit could be, and always was, brought for *foreclosure or sale*; and an English mortgage was the only class of mortgage in which such suit could be brought—*Vasudeva v. Srinivasa*, 30 Mad. 426 (P.C.). But under clause (a) of sec. 67 of the Transfer of Property Act, as recently amended in 1929, the remedy of foreclosure has been taken away from an English mortgage. Consequently a suit for *sale only* is now allowed under an English mortgage, and such suit falls under Art. 132. The above decision of the Privy Council is no longer good law.

549. Mortgage by conditional sale :—A suit to recover money due under a mortgage by conditional sale or for foreclosure is governed by Article 132 and not by Article 147—*Sheoram Singh v. Babu Singh*, 48 All. 302, 24 A L J 295, A I R 1926 All. 493; *Balaram v. Mangta*, 34 Cal. 941 (945) (S B)

550. Charge —The word "charge" is used in a very general sense in Article 132. The mere fact that a charge does not come within the meaning of sec. 100 of the Transfer of Property Act, does not necessarily imply that it is not a charge under Art. 132—*Kotayya v. Kotappa*, 49 M.L.J. 117, 90 I C 551, A I R 1926 Mad 141.

The debt must be effectively charged on the immoveable property *i.e.*, the charge must be one that is binding upon it. If the mortgage is not binding on the property, the period of six years (Art. 116) and not that of 12 years, would apply—*Kameshwar v. Raj Kumari*, 20 Cal. 79 (84) (P.C.)

A will devising immoveable properties and directing the devisee to pay a certain debt of the testator from these properties creates a charge upon the properties in respect of the debt, and a suit brought by the auction purchaser of the creditor's claim to recover the abovementioned debt falls within Article 132, and is not a suit for money lent under Article 57—*Girish Chunder v. Annundamoyi*, 15 Cal. 66 (69) (P.C.). Where a testator charged all his real estate with payment of his debts, a claim against the testator's estate on a simple contract debt would be governed by the 12 years' rule—*Warburton v. Stephens*, (1889) 43 Ch. D. 39

Where by a bond the debtor hypothecated all his properties ("my wealth and property") without specification, held that the bond created a charge upon the immoveable property of the debtor although no particular property was specified in the bond, and a suit to enforce payment of the amount due out of an immoveable property belonging to the debtor was governed by this Article—*Ramsiddh v. Balgobind*, 9 All. 158 (164). But in another Allahabad case, where the debtor stipulated that if the principal and interest were not paid up at the stipulated period, the creditor would be at liberty to recover the money, by instituting a suit,

from "my moveable and immoveable properties, my own milk" it was held that the language of the bond was too vague to warrant the inference that the bond contemplated the creation of a mortgage of a definite estate, and that a suit upon the bond was governed by Art. 66, or 116, and not by this Article—*Collector of Etwah v. Beti Maharani*, 14 All. 162 (164).

Where maintenance is charged upon immoveable property, a suit to recover arrears of maintenance is governed by Art 132—*Ahmed Hossein v. Nihaluddin*, 9 Cal 945 (951) P C.

Where immoveable properties were hypothecated to the principal by the agent as security for the proper discharge of his duty, a suit for accounts by the principal would be governed by Art. 132 in as much as it is by implication a suit to enforce a charge—*Madhusudhan v. Rakhal*, 43 Cal. 248 (following *Hafezuddin v. Jadu* 35 Cal 298, and dissenting from *Jogesh v. Benode*, 14 C W N 122); *Troilokhya v. Abinash*, 21 C L.J. 459, 24 I.C. 18. See Note 411 under Art 89

Where a guardian gave certain immoveable property as security for the due fulfilment of his duties to his ward, a suit by the latter to recover monies which might be found due on account being taken from the guardian, out of the property charged, falls under this Article—*Fazul Nishan v. Muhammadji*, 33 P R 1897.

Where a mortgage document expressly made the mortgaged properties liable not only for repayment of principal, but also for interest, the interest was held to be charged upon the property—*Vasudevan v. Konurupettamanna*, 2 L.W 853, 30 I C. 818, *Davani v. Ratna*, 6 Mad. 417. As for interest after due date of mortgage, see note 483 under Art. 116.

Where several properties are liable for the payment of an annuity, which has been discharged by the owner of one of such properties, a suit for contribution by such owner against the owners of the other properties is a suit to enforce a charge on the properties and is governed by this Article and not by Art. 99—*Yakub v. Kishen*, 28 All 743 (746).

A mortgage bond executed by the father in a Mitakshara family for the benefit or necessity of the family, and not being shown to have been effected for any immoral purpose, is valid and binding on the sons, and a suit to enforce that mortgage against the sons is governed by this Article—*Prankrishna v. Jadu*, 2 C W N 603, *Maheshwar v. Kisen* 34 Cal 184 (190), *Sheo Narain v. Mokshoda*, 17 C W N 1022, 19 I C 878; *Ran Singh v. Sobha*, 29 All 544 (551); *Jaleswar v. Anrut*, 35 All 302, *Aribudra v. Dorasami*, 11 Mad 413 (415). But where the mortgage is executed by the father to discharge a debt which is neither antecedent nor one for family purposes, the mortgage is not binding on the sons and does not create a charge upon the entire family property but upon his individual share only; and a suit brought after the death of the father, so far as it claims to affect the shares of the sons, is governed by Art 120, and not by Art 132 as there is no charge on immoveable property enforceable against the sons—*Brijnandan v. Bidya Prosad*, 42 Cal 1068, 1092 (F.B.), 19 C.W.N. 849.

A claim for the balance of money due to a builder who undertook the erection of a building on the express stipulation that he would have a lien on the building for all sums due to him until paid, is a claim for money charged upon immoveable property under this Article—*Daulat Ram v. Woollen Mills*, 95 P.R. 1908, 165 P.W.R. 1908.

If a pro-note is first passed for a certain debt, and subsequently immoveable property is hypothecated for the same debt, a suit to recover the loan due under the pro-note by enforcing the charge created by the hypothecation bond is governed by Article 132, and may be brought within 12 years from the date when the money became due, although the creditor's remedy for enforcing the personal obligation (under the pro-note) in respect of the loan may be barred—*Behari Lal v. Beni Madho*, 27 O.C. 268, A.I.R. 1925 Oudh 92, 79 I.C. 492.

L purchased an oil-well subject to a mortgage in favour of B and to a right of pre-emption in favour of N. He made payments to the mortgagee B in part satisfaction of the mortgage-decree on the oil-well, such payments being necessary to save the oil-well. Held that L had a charge on the oil-well for the amount paid as against N who exercised his right of pre-emption, as well as against persons claiming through N, and a suit to recover the amounts by enforcing the charge fell under Article 132—*Ma Lon v. Ma Nya*, 1 Rang. 714, 79 I.C. 766, A.I.R. 1924 Rang 204.

A trustee of a mosque making advances out of his own pocket to meet the expenses of the mosque no doubt acquires a charge upon the trust property, but this charge is not like an ordinary charge which entitles a man to bring the charged property unconditionally to sale. It is a charge which enables him to take the amount out of the rents and profits of the trust property or through raising monies by the creation of a similar charge. Article 132 was not intended to cover such a qualified charge, and the suit by the plaintiff for recovery of the money is governed by Art. 120—*Abkan Saheb v. Soran*, 38 Mad. 260 (267, 269), following *Peary v. Narendra*, 37 Cal. 229 (P.C.).

Charge on moveable property:—A suit to enforce a charge on moveable property is governed by Art. 120—*Nim Chand v. Jagabandhu*, 22 Cal. 21. See Note 508 under Article 120.

Payment of revenue:—Where Government revenue is paid by one of the co-sharers of the estate to save the entire estate from sale, such payment does not create a charge in his favour upon the estate; and a suit to recover such amount is governed by Art. 99, and not by this Article—*Kinu Ram v. Muzaffar*, 14 Cal. 809 (F.B.); *Khub Lal v. Padmanund*, 15 Cal. 542; *Shivrao v. Pundlick*, 26 Bom. 437. But in several other cases it has been held that such payment creates a charge—*Raja of Vizianagram v. Raja Setrucherla*, 26 Mad. 686 (F.B.); *Alayakammal v. Subbaraya*, 28 Mad. 493 (494); *Kotayya v. Kotappa*, 49 M.L.J. 117, 90 I.C. 551, A.I.R. 1926 Mad. 141; *Achut v. Hari*, 11 Bom. 313. See Note 443 under Article 99.

But if the revenue is paid not by a co-sharer but by the lessee in order to protect his interest in the estate, who thereafter brings a suit for

the recovery of the amount, the suit does not fall under Article 99, which applies only to a co-sharer, but is governed by this Article—*Rem Dutt v. Horalkh*, 6 Cal. 549.

Discharge of decree.—If one of several joint judgment-debtors pays off the decretal amount, a suit by him for contribution falls under Art. 99. If, however, the decretal amount is paid by a person other than a judgment-debtor, the proper Article applicable to a suit for recovery of the amount so paid is Article 81. But Article 132 cannot apply, as such payment does not create any charge on the property of the judgment-debtor; the fact that the decree might have been realised in execution by the sale of the immoveable properties of the judgment-debtor does not give the person making the payment a charge—*Muthuswami v. Ponnappa*, 51 Mad. 815, A.I.R. 1929 Mad. 820 (822), 110 I.C. 613, 55 M.L.J. 436.

Suit against surety.—A suit against a surety on a simple money-bond for the payment of a mortgage-debt by the mortgagor, is not a suit to enforce payment of money charged on immoveable property, and Article 132 cannot apply. The period of limitation is six years from the expiry of the mortgage period—*Muthu Chettiar v. Rangappa*, 53 M.L.J. 453, 105 I.C. 168, A.I.R. 1927 Mad. 945.

551. Vendor's lien.—Unpaid purchase money creates a charge in favour of the vendor on the property in the hands of the vendee, by virtue of the provision of sec. 55 (4) (b) of the Transfer of Property Act, and a suit by the vendor to recover it by enforcement of such lien or charge falls under Art. 132; but where a personal remedy against the vendee is sought, Art. 111 applies—*Virchand v. Kumaji*, 18 Bom. 48; *Chunilal v. Bai Jethi*, 22 Bom. 846; *Har Lal v. Muhamdi*, 21 All. 454; *Manfrunnissa v. Akbar*, 30 All. 172 (174); *Rama Krishna v. Subramania*, 29 Mad. 305; *Rukan Din v. Hasan Din*, 72 I.C. 897, A.I.R. 1923 Lah. 23. See notes under Art. 11. Time runs from the date of the sale-deed or within a very short but reasonable period therefrom—*Kallu v. Ramdas*, 26 A.L.J. 53, A.I.R. 1929 All. 121 (123), 107 I.C. 679.

552. Co-mortgagor's charge.—See secs. 82, 92 and 95 of the Transfer of Property Act (as amended in 1929).

Where several properties belonging to several owners are mortgaged to secure the same debt, the owner of the property that has been made liable for more than its rateable proportion of the debt can claim contribution proportionately against the owners of other properties, and has a charge on the other properties under Section 82 of the Transfer of Property Act; and a suit to enforce the charge falls under this Article and not under Article 99—*Bhagwan v. Karam Husain*, 33 All. 708 (716) (F.B.); *Ibn Husain v. Ramdai*, 12 All. 110 (114).

Where a co-mortgagor redeems the mortgaged property, he acquires a charge, under sec. 95 (now 92) of the Transfer of Property Act, on the share of each of the other co-mortgagors, for his proportion of the mortgage-money; and a suit to enforce the share is governed by this Article—*Bhagwan Das v. Hardei*, 26 All. 227; *Kotayya v. Kotappa*, 49

M.L.J. 117, A.I.R. 1926 Mad. 141; *Rajkumari v. Mukunda*, 25 C.W.N. 283, 57 I.C. 868. Where there had been several payments in part satisfaction of a mortgage, the payment of the balance due is as much a redemption as the payment of the whole sum due in the case in which there has been no previous part-payment. A co-mortgagor who pays the balance of the mortgage-money and redeems the mortgage acquires a charge on the property under sec. 95 (92) of the Transfer of Property Act, and his suit to enforce the charge falls under this Article—*Hira Kuer v. Paiku*, 3 P.L.J. 490 (491), 46 I.C. 479.

It has been held in a Calcutta case that the co-mortgagor gets a charge under section 95 T. P. Act only when he redeems, and there can be redemption only so long as the mortgage subsists. Where a decree on the mortgage has been obtained by the mortgagee, and an order absolute for sale has been passed under sec. 89 (old) of the T. P. Act, the security as well as the mortgagor's right to redeem are both extinguished, and any payment made thereafter by a co-mortgagor cannot be taken as payment by way of 'redemption'; consequently no charge is created in favour of the person who makes such payment. His suit to recover the money falls under Article 61 or 99 and not under Article 132—*Nawab Jahanara v. Mirza Shujauddin*, 9 C.W.N. 865 (867). See also *Rabnath v. Ganesh*, 23 O.C. 334, 60 I.C. 213. But the Bombay High Court holds that a charge is created in such a case—*Danappa v. Yamnappa*, 26 Bom. 379, and this is also the view of the Allahabad High Court, *Ibn Hussain v. Ramdai*, 12 All. 110, where the mortgage was satisfied by a co-owner of the property after decree.

553. Mortgagee's charge :—Where a mortgaged property is sold for arrears of revenue, free from all incumbrances, the mortgage is invalid as against the purchaser, but the mortgagee is entitled to a charge on the surplus sale-proceeds (sec. 73, Transfer of Property Act), and a suit to enforce such charge is governed by this Article and not by Article 120—*Upendra v. Mohiri Lal*, 31 Cal. 745 (751); *Kamala Kanta v. Abdul Barkat*, 27 Cal. 180 (184), *Umatara v. Umacharan*, 3 C.L.J. 52, *Jogeshwar v. Ghanashyam*, 5 C.W.N. 356 (359). But *quære*, is it still a 'charge' after the amendment of sec. 73, T. P. Act?

When a property is sold under a decree obtained by a first mortgagee in a suit in which the puisne incumbrancers were parties, it passes into the hands of the purchaser discharged from all incumbrances. But the rights of the puisne incumbrancers are not extinguished or discharged by the sale, but transferred thereby to the surplus sale-proceeds. A suit brought by a second mortgagee to enforce his lien on those sale-proceeds in the hands of a third mortgagee who has notice of the second mortgage, and who has taken away the sale proceeds in execution of a decree obtained upon his mortgage, is governed by this Article and not by Article 120—*Berhamdeo v. Tara Chand*, 33 Cal. 92 (111, 112) affirmed on appeal to the Privy Council in 41 Cal. 654 (661) (P.C.). Similarly, a suit by a prior mortgagee, for payment of his mortgage-money out of the sale-proceeds remaining in the hands of a subsequent mortgagee who has foreclosed

the mortgage and sold the property to a third person, is governed by this Article—*Vishwanath v. Shankarlal*, 12 N.L.R. 90, 34 I.C. 704.

Suit by Puisne Mortgagee:—If a first mortgagee brings a suit on his mortgage, without impleading the puisne mortgagee, and in execution of his decree purchases the mortgaged property, and then the puisne mortgagee also brings a suit on his mortgage, without impleading the prior mortgagee, and similarly purchases the property in execution of his decree, and afterwards the puisne mortgagee brings a suit for redemption of the prior mortgage, held that the right of the puisne mortgagee to redeem the prior mortgage is only ancillary to his right to work out his remedy against the mortgaged estate (Fisher, p. 741). He is only permitted to redeem for the purpose of working out his own security—*Ramsbotham v. Wallis*, (1836) 5 L.J.N.S. Ch. 92. The right of a puisne mortgagee to redeem the prior mortgage in a case where he has not been joined in a suit on the first mortgage is a right to redeem the first mortgage with the view of enforcing his own mortgage, it is only a means of securing the object of enforcing his own mortgage by sale. The proper Article applicable to the case is Article 132 and not 148. Time runs from the due date of his mortgage, and no fresh period runs from the date of his purchase—*Lakshmanan v. Sella Muthu*, 47 M.L.J. 602, A.I.R. 1925 Mad. 76 (77), 84 I.C. 301; *Nilmadhab v. Joygopal*, A.I.R. 1926 Cal. 560, 91 I.C. 719; *Nidhiram v. Sarbessur*, 14 C.W.N. 439 (442, 443), 5 I.C. 877, *Appaya v. Venkatramayya*, 20 L.W. 620, A.I.R. 1925 Mad. 150 (151), 82 I.C. 864 (following 14 C.W.N. 439).

But the Patna High Court dissents from this view and holds that the second mortgagee's right of redemption cannot be considered as a right to enforce payment of money charged upon immoveable property, because the second mortgagee in a suit for redemption does not seek to recover the money due to him upon his second mortgage. Consequently Article 132 cannot apply to his suit, but Art 148—*Ramphari v. Kashinath*, 5 Pat. 513, A.I.R. 1926 Pat. 337 (339), 94 I.C. 284.

But if the contrary happened i.e., where the puisne mortgagee at first sued on his mortgage without impleading the prior mortgagee, obtained a decree for sale and purchased the property in execution of his decree, and then the prior mortgagee similarly brought a suit on his mortgage without impleading the puisne mortgagee, and purchased the property in execution of his decree, and afterwards the puisne mortgagee sued the prior mortgagee to redeem the prior mortgage, held that the puisne mortgagee not having been impleaded in the prior mortgagee's suit, the decree in that suit was not binding on the puisne mortgagee, that the right to redeem the prior mortgage had not ceased to exist and the relationship of a puisne mortgagee and prior mortgagee still subsisted between the parties, and as such the plaintiff was entitled to redeem the prior mortgage and thus to remove the defect in his title to the property. The suit was governed by Art 148 and not by Art. 132—*Priya Lal v. Bohra Champa Ram*, 45 All. 268 (270), A.I.R. 1923 All. 271, 79 I.C. 498. The distinction between the two sets of cases has

been thus explained: where it was that the *puisne mortgagee first sued* on his mortgage and in execution of his decree was put in possession of the property, he subsequently brings a suit merely for redemption, being in possession of the property, and the suit falls under Art. 148, but where the *prior mortgagee had first sued* on his mortgage, and obtained possession in execution of his mortgage-decree, the *puisne mortgagee's* suit for redemption is not merely a suit for redemption but also for recovery of possession, and in suing for recovery of possession, he is not seeking to recover possession as against the mortgagee, since the defendant to this suit is in possession of the property not by virtue of his mortgage but by virtue of his purchase of the property at the sale in execution of his decree. The suit is really to enforce the *puisne mortgagee's* mortgage against the defendant (*prior mortgagee*)—*Nilmadhab v. Joy Gopal*, A.I.R. 1926 Cal. 560, 91 I.C. 719.

But where the *prior mortgagee* brings a suit on his mortgage without impleading the *puisne mortgagee* and obtains a decree for sale, but before he executes the decree, the *puisne mortgagee* brings a suit on his mortgage impleading the *prior mortgagee* but obtains a decree for sale against the mortgagor only (the *prior mortgagee* being dismissed from the suit on his setting up a prior title), and then the *prior mortgagee* purchases the property in execution of his decree, and thereafter the *puisne mortgagee* similarly purchases it in execution of his decree, and then brings a suit to redeem the *prior mortgage*, held that the Article applicable to the *puisne mortgagee's* suit for redemption in such circumstances is Art. 148, and not Art. 132. Whenever a suit for redemption is brought by a person entitled to redeem against a mortgagee, Art. 148 and no other Article applies to it, and by no straining of language can a suit for redemption fall under Article 132, as it is not a suit to enforce payment of money—*Sayamali v. Anisuddin*, 33 C.W.N. 1067 (1074, 1075) (F.B.), 50 C.L.J. 152, 119 I.C. 135, A.I.R. 1929 Cal. 609 (distinguishing *Nidhiram v. Surbessur*, 14 C.W.N. 439).

554. When money becomes due.—Where a mortgage-deed fixes no time for payment time runs from the date of the bond; if there has been any payment of money to the mortgagee, time runs from the date of the last payment (sec. 20)—*Nilcomal v. Kamini Kumar*, 20 Cal. 269 (272). In case of a mortgage-bond executed to secure a loan payable *on demand*, the word "on demand" should be construed as merely technical words meaning "forthwith" or "immediately"; no actual demand is necessary in order to establish a starting point for limitation under Article 132, and time runs from the date of the bond—*Perianna v. Muthuvira*, 21 Mad. 139 (149); *Barkatunnissa v. Madhub Ali*, 42 All. 70 (73); *Perumal v. Alagiriswami*, 20 Mad. 245 (248); *T. C. Bose v. Obedur*, 6 Rang. 297, A.I.R. 1928 Rang. 189 (191), 111 I.C. 132.

If a mortgage-bond is payable within a certain period, e.g. in three years, time runs from the expiry of the period (three years). Where a mortgage-bond executed in May 1909 was payable in three years, but it was provided that if the mortgagor transferred the mortgaged property,

the creditors should, before the expiry of the term, be at liberty to sue for the recovery of the mortgage-money, and in March 1911 the mortgagor hypothecated a portion of the mortgaged property to another by a registered bond, but the mortgagee had no notice of this hypothecation, held that a suit instituted on the mortgage in March 1924 was not barred, as time ran from May 1912 and not from March 1911—*Ashiq Husain v. Chaturbhuj*, 50 All 328, A.I.R. 1928 All. 159 (161), 108 I.C. 152, 26 A.L.J. 41. Although under sec. 3, Transfer of Property Act (as amended in 1929), registration itself amounts to notice, still that provision cannot apply to the present case, because it is doubtful whether registration would amount to notice for the purposes of limitation.

An assignee from the mortgagee (whether by private sale or by execution sale) is in the same position as the mortgagee himself, and he must sue within the same period as is allowed to the mortgagee; he cannot claim a greater right than the mortgagee himself had in the matter, and the mere fact that a particular right has changed hands by assignment does not operate to cause a fresh period of limitation to run from the date of assignment—*T. C. Bose v. Obedur Rahman*, 6 Rang. 297, A.I.R. 1928 Rang. 189 (190), 111 I.C. 132.

Where a second mortgagee discharges a decree obtained by the first mortgagee, he does not become an assignee of the decree and is not entitled to execute the decree, but he acquires a charge on the mortgaged property; and in a suit by him to enforce the charge, time runs from the date on which he made the payment in satisfaction of the decree, and not from the date when the cause of action accrued to the prior mortgagee. The puisne mortgagee is not an assignee of the prior mortgagee; and the right of the puisne mortgagee cannot accrue before he made any payment at all—*Shib Lal v. Munni Lal*, 44 All 67 (69, 70), A.I.R. 1922 All. 153, 63 I.C. 604. But the Patna and the Madras High Courts dissent from this view and are of opinion that a puisne mortgagee paying off the decree obtained by the prior mortgagee becomes entitled only to the security held by the prior mortgagee; and the period of limitation for his suit to enforce the prior mortgage is to be counted from the due date of that mortgage. That is, he is bound to enforce his right within the period of limitation allowed to the first mortgagee. He does not acquire any fresh charge on the property from the date of his payment, consequently time does not run from the date on which he paid off the decree on the prior mortgage—*Sibananda v. Jagmohan*, 1 Pat. 780 (785, 786), 3 P.L.T. 533, 68 I.C. 707, A.I.R. 1922 Pat. 499; *Kotappa v. Raghavayya*, 50 Mad 626, 102 I.C. 316, A.I.R. 1927 Mad. 631 (635). The Nagpur J. C. Courts takes the same view as the Allahabad High Court, viz., that the period of limitation runs from the date when the puisne mortgagee made the payment and became entitled (under sec. 74 (92) Transfer of Property Act) to the right created by the decree on the prior mortgage—*Suryabhan v. Renuka*, 8 N.L.J. 232 (F.B.), 92 I.C. 118, A.I.R. 1926 Nag. 84, overruling *Nathuram v. Sheolal*, 13 N.L.R.

217, 42 I.C. 796, (where it was held that the period of limitation ran from the due date of the prior mortgage).

A mortgage-bond dated 1911 after providing for half yearly payment of interest, provided that the mortgagor could redeem the property only in 1920, and not before, that the mortgagee was not to bring the property to sale on account of default until 1920, that the mortgagee might at his wish recover, either by mutual consent or by suit, the mortgage-money with interest even before 1920 but that the mortgagee was not entitled to sell up the property till 1920. Held on a construction of the terms of the deed, that a suit to enforce the mortgage by sale of the property could not be brought before 1920, and that the suit filed in 1926 was not barred—*Ram Koer v. Patraj Koer*, 3 Luck. 439 (F.B.), 5 O.W.N. 385, 112 I.C. 130, A.I.R. 1928 Oudh 289 (290).

Where the surety of a mortgagor pays up the mortgage-money he cannot be in a better position than the original mortgagee. And so in a suit brought by the surety to recover the money from the mortgagor, time runs from the same date as it would have run had he been the original mortgagee i.e., from the due date of the mortgage bond, and not from the date when the surety paid off the mortgage—*Barkatunnissa v. Mahbub Ali*, 42 All. 70 (74).

Where a co-mortgagor redeems the mortgage, his position is that of an assignee of the original security and the period of limitation for his suit to enforce his charge against the other co-mortgagors is the same within which the original mortgagee could have brought his suit on his mortgage, that is, the period runs from the due date of the original mortgage—*Rajkumar v. Mukunda*, 25 C.W.N. 283, 57 I.C. 868. But the Allahabad High Court and Oudh Chief Court dissent from this ruling and are of opinion that limitation runs not from the due date of the mortgage which is paid off, but from the date of payment by the co-mortgagor—*Qamar Jahan v. Munney Mirza*, 12 O.L.J. 313, 2 O.W.N. 413, 92 I.C. 559, A.I.R. 1925 Oudh 613, *Rameshwar v. Sheorani*, 2 Luck. 686, A.I.R. 1927 Oudh 552, 4 O.W.N. 783, 105 I.C. 302; *Aziz Ahmad v. Chhotu Lal*, 50 All. 569, A.I.R. 1928 All. 241 (245), 109 I.C. 38. The Allahabad and Oudh decisions seem to be no longer good law, in view of sec. 92 T.P. Act (as amended in 1929) under which the redeeming co-mortgagor is subrogated to the rights of the mortgagee.

554A. Instalment mortgage bond :—In the case of an instalment mortgage bond, the principle of Article 75 should be applied in determining the starting point of limitation. Thus, where by a mortgage-bond executed by the defendants, the mortgage-money was made payable by four instalments and in case of default in payment of any instalment, the plaintiff might at his option sue either for the amount due on the instalment or for the whole amount due on the bond, it was held that as there was nothing to show that the mortgagee waived the option to sue for the whole amount on default, the whole amount became due when default was first made in the payment of an instalment, and that limitation ran from the date of the first default and not from the

expiration of the term of the mortgage-bond—*Sitab Chand v. Hyder*, 24 Cal. 281 (285).

Where a hypothecation bond provided for the repayment of the principal sum on a certain date, with interest in the meantime payable monthly, and further provided that on default in payment of interest the principal and interest should become payable *on demand*, it was held that the period of limitation prescribed by this Article began to run from the date of the first default in the payment of interest, and it was further held that no actual demand was necessary to create the plaintiff's cause of action as the words 'on demand' are merely technical words equivalent to 'immediately' or 'forthwith'—*Perumal v. Alagirisami*, 20 Mad. 245 (248). But if the bond provided that upon default of payment of interest annually, the principal would become due with interest at an enhanced rate from the date of the bond, whenever the creditor would make the demand, it was held that the cause of action did not arise upon the first default in the payment of interest, but the liability of the

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The case of *Raj Kumari v. Mukunda*, 25 C.W.N. 283, has been overruled by the Full Bench in *Umar Ali v. Asmat Ali*, 35 C.W.N. 409 where their Lordships have laid down that under sec. 95 (old) of the T. P. Act the position of the redeeming co-mortgagor was the same as if a new mortgage was created in his favour, and that the period of limitation for a suit by the co-mortgagor for contribution would run from the date of his payment and was not the same within which the original mortgagee could have brought a suit on his mortgage.

The Full Bench also holds that after the amendment of sec. 95 T. P. Act by the Amendment Act of 1929, the right of a redeeming co-mortgagor is the same right as that of the mortgagee whom he redeems, and henceforth in cases under the amended sec. 95 the decision in *Raj Kumari v. Mukunda*, 25 C.W.N. 283 would apply as good law.

the period of mortgage and suing only for the interest due, or of cutting short the mortgage-period and suing for the whole debt, principal and interest. No interest was ever paid. Held that the cause of action for a suit for recovery of the whole debt arose on 8th December 1896 (i.e., upon two defaults in the payment of the six-monthly interest) and not upon the lapse of three years mentioned in the bond—*Sham Sundar v. Abdul Ahad*, 71 P.R. 1915, 31 I C 808.

A mortgage provided that interest was to be paid every six months and that any interest remaining unpaid would at the close of the year be treated as principal and would thereafter carry interest at the bond rate. It further provided that in the event of non-payment of interest for two

consecutive half-years, the mortgagee would have the power to benefit himself by charging the compound interest aforesaid, or to realise at once the whole of the principal and interest alone. *Held* that the mortgagee was given three options, and if he did not choose to exercise his option of suing for the whole amount due on the occurrence of a default but chose instead the option of letting the interest go at compound rate, it could not be said that time began to run against him from the date of the default—*Girdhari v. Gobind Ram*, 19 A.L.J. 456, 63 I.C. 25. But this case has been dissented from in 45 All. 27 cited below.

In a mortgage bond it was stipulated that the principal was to be paid within 12 years and interest was to be paid annually. It was further stipulated that in default of payment of interest in any year, the creditor would have the option to add the interest to the principal and to wait till the expiry of the stipulated period or to recover the principal and interest at once. Nothing was paid at all by the mortgagor. In a suit for sale on the mortgage, it was held that time ran as soon as the first default was made. From the terms of the mortgage-deed, it is obvious that as soon as the first default was made a right accrued to the mortgagee to sue for the whole sum with interest. On default having been made, the money certainly did become due at once; the mere circumstance that the creditor had the option of not calling in the money cannot wipe out the fact that the money in fact became due—*Shib Dayal v. Meherban*, 45 All. 27 (F.B.), 20 A.L.J. 819, 69 I.C. 981, A.I.R. 1923 All. 1 (dissenting from *Girdhari v. Gobind*, 19 A.L.J. 456); *Sheoram v. Babu Singh*, 48 All. 302, 24 A.L.J. 295, A.I.R. 1926 All. 493, 94 I.C. 849.

A mortgage deed of 1890 provided payment of principal by instalments in ten years, and of interest monthly, and further provided that in case of default in payment of any one of the instalments of principal or interest the whole of the mortgage money would become due and be payable on demand. *Held* that money under the bond became due within the meaning of this Article when the first default was made in 1890, and not after the expiry of ten years from the date of the bond, and consequently a suit brought in 1912 was barred. The learned Chief Justice remarked: "It seems to me that the money is due when it can be legally demanded, and it is admitted in the present case that the money secured by this mortgage could have been legally demanded and recovered after the first default; and had a suit been then brought for its recovery by sale of the mortgaged property, the defendants could not have pleaded that such a suit was premature"—*Gaya Din v. Jumman Lal*, 37 All. 400 (408) (F.B.)

In a mortgage-bond it was stipulated that the mortgagor would repay the loan in 12 years, that he would pay annually Rs. 500 on account of principal and interest, that if he were unable to pay the interest any year, the interest might be treated as principal, and that if there was any default in payment of the sum of Rs. 500 per annum, the mortgagee was to have power, without waiting for the expiry of the stipulated period, to set aside all the other stipulations embodied in the bond, and to bring a suit to realise the entire principal together with interest. No annual interest was

paid. *Held* that time began to run from the first default in the payment of the annual sum of Rupees 500, and not on the expiry of the term of the mortgage-bond—*Pancham v. Ansar Husain*, 43 All. 596 (599), 19 A.L.J. 592, 63 I.C. 441. Under a mortgage executed in 1902, the principal sum borrowed was Rs. 1,200, and the sum was made payable in annual instalments of Rs. 100. On default of payment of any one instalment, the whole of the balance was to be paid at once. In 1903 and 1904 the mortgagor paid only Rs. 44. In 1905 the mortgagee filed a suit to recover the amount of the first two instalments, and obtained a decree. In 1917 the mortgagee filed a suit for recovery of the remaining 10 instalments. *Held* that the suit was barred not only by O II, r. 2 of the C. P. Code but also by the law of limitation, because the right of action to sue for the whole amount arose from the date of the first default (1903)—*Shrinivas v. Chanbasagowda*, 25 Bom. L.R. 203, 72 I.C. 290, A.I.R. 1923 Bom. 201.

So also, the principle of waiver indicated in Article 75 may be applied in determining the time when the money sued for becomes due within the meaning of Article 132. Thus, a mortgage bond provided for payment of the debt in 12 instalments, the first falling due in Pous 1308 B.S., and others in the month of Pous of each of the next 11 years ending with 1319. It was further provided that upon default in the payment of any one instalment the creditor would be entitled to recover the entire amount due, without waiting for the future instalments falling due. The plaintiff alleged that the first instalment was duly paid, and the instalments for 1309 to 1311 were paid and accepted although the payments were made out of time, and the suit was brought in 1326 B. S. for the subsequent instalments. *Held* that the suit was not barred, because the payment and acceptance of the overdue instalments constituted a waiver, applying the principle of Article 75, and that the plaintiff was entitled to recover the subsequent instalments. The penalty having been waived, the parties were remitted to the same position as they would have been if no default had occurred—*Surendra Nath v. Rishie Case Law*, 27 C.W.N. 893, 79 I.C. 291, A.I.R. 1923 Cal. 139.

But the Madras High Court is of opinion that in an instalment mortgage bond the cause of action accrues on the expiry of the period fixed in the mortgage bond for the repayment of the principal, and not when the first default is made, that Article 132 should be construed in its plain and natural sense, and the words of Article 75 should not be imported into Article 132 for the purpose of determining the starting point of limitation, and that the mortgagee is not bound to take advantage of the default clause but is at liberty to ignore it as it merely gives an option to recover the whole amount upon default—*Narna v. Ammani*, 39 Mad. 981 (986); *Muthiah Chettiar v. Venkatasubbarayulu*, 49 Mad. 403, A.I.R. 1926 Mad. 160, 49 M.L.J. 394, 90 I.C. 1033. This view has also been taken by the Patna High Court in *Ramsekhar v. Mathura*, 4 Pat. 820, 90 I.C. 249, A.I.R. 1925 Pat. 557 (following 39 Mad. 981). See this case cited in Note 483 under Article 116. It should be noted that the view taken by the Allahabad High Court in 37 All. 400 and 45 All. 27, cited above

(viz. that the period of limitation runs from the date of the first default in the payment of an instalment, in spite of the option given to the mortgagee to wait till the expiry of the term of the mortgage) seems to have been disapproved of by the Privy Council in the recent case of *Pancham v. Ansar Hussain*, 48 All 457 (P.C.), 24 A.L.J. 736, 31 C. W.N. 324, A.I.R. 1926 P.C. 85, 99 I.C. 650, though no definite opinion has been passed by them.

555. Suit against person holding adversely to the mortgagor.—A suit for sale upon a mortgage brought against the mortgagor and a person claiming a right adversely to the mortgagor by twelve years' possession (the adverse possession commencing after the mortgage) is governed by this Article. Such a suit is not a suit for possession under Article 144, because the plaintiff cannot bring a suit for possession without bringing a suit under Art. 132. The suit is in time, if brought within 12 years from the date when the money becomes due. The period of limitation does not run from the time when possession was taken by the adverse possessor, because the adverse possession of the third party obtained after the mortgage does not affect the mortgagee's right—*Rajnath v. Narain*, 36 All 567 (571) (F.B.), distinguishing *Karan Singh v. Bakar Ali*, 5 All. 1 (P.C.).

556. Malikana.—*Malikana* is an annual recurring charge on immoveable property and must be sued for within 12 years from the time when the money sued for falls due—*Harmuzi v. Hirdaynarain*, 5 Cal. 921; *Jagannath v. Kharachi*, 10 C.W.N. 151. A suit for an allowance for the maintenance of the younger member of a family, charged upon the inheritance to which the eldest male member alone succeeds, is within this Article—*Ahmed Hossein v. Nuthaluddin*, 9 Cal. 945.

In order to bring the suit within this Article, the plaintiff coming into Court to claim a *malikana* allowance must claim it as a charge upon the immoveable property concerned—*Nathu v. Ghansham*, 41 All. 259; and if he claims it as a charge upon the property, the suit is governed by this Article, notwithstanding that the Court refuses to pass a decree against the property—*Shaida v. Phullo*, 35 All. 185. If, however, the plaintiffs do not seek to enforce it as a charge on the land for which it is payable, the suit is governed by Art. 115, in as much as in such a case the claim must be regarded as one arising out of a quasi-contract created by law—*Kallur v. Gunga*, 33 Cal. 998.

A suit for declaration of a right to receive *malikana* annually is a suit to establish a periodically recurring right and falls under Article 131 (*Gopinath v. Bhugwat Pershad*, 10 Cal. 967); but a suit to recover *malikana*, coupled with a claim for declaration of the plaintiff's right to receive *malikana*, falls under Article 132, because the declaration is merely auxiliary to the claim to recover *malikana*, and hence although the claim for declaration may be barred, the right to recover *malikana* itself is not necessarily barred—*Midnapore Zemindary Co. v. Muktaleshi*, 6 Pat. 51, 98 I.C. 189, A.I.R. 1926 Pat. 340.

The word 'malikana' in this Article is not restricted to malikana as contemplated in the Bengal Regulations—*Midnapore Zemindary Co. v. Muktaleshi* (supra).

557. Huqq :—This Article applies to suits which are brought by a hakdar against the person originally liable for payment of the hak, and not to suits by one sharer in a vatan against another sharer or alleged sharer who has improperly received the plaintiff's share of the hak, such a suit falls under Art 62—*Harnukhgauri v. Harisukh* 7 Bom 101 (1903).

A right to receive a *nankar* allowance out of the profits of a particular village is a kind of huqq—*Deputy Commissioner v. Jagivan* 10 O C 49, 33 I.C. 461.

558. Clause (c)—Equitable mortgage—Clause (c) of Explanation has been added by sec 9 of the Transfer of Property Amendment Supplementary Act (XXI of 1929). The reasons for inserting this clause have been thus stated—

"There is much conflict of decisions regarding the period of limitation which governs a suit to recover the money due on a mortgage by deposit of title-deeds. Some Courts have held that it is 60 years, while others hold that it is 12 years. We think that this conflict should now be set at rest; and as the preponderance of opinion is in favour of providing a 12 years' rule in such cases, we propose to bring these mortgages under Article 132 of the Indian Limitation Act, 1908"—*Report of the Select Committee* (Gazette of India, 1929, Part V, p 126).

The Calcutta High Court has held that according to the practice of that High Court the appropriate remedy in case of an equitable mortgage is a decree for sale and not for foreclosure (and consequently Art 132 applies and not Art 147)—*Srinath v. Gadadhar*, 24 Cal 348 (350). But according to the Bombay High Court, a mortgagee by deposit of title-deed had a right to sue for foreclosure or sale, and his suit fell under Art 147—*Manckji v. Rustomji* 14 Bom 269 (272, 273). This is no longer good law. Compare also sec 96, Transfer of Property Act (as amended in 1929), under which an equitable mortgage stands on the same footing as a simple mortgage.

The result of the new clause (c) of this Article would be that in Bombay a large number of mortgage-suits for which the period of limitation had hitherto been believed to be 60 years under Art 147 would be found to be barred by limitation. In order to provide for those cases as well as for the continuance of pending suits, the Legislature has enacted a new section—sec 15 (2) of the Transfer of Property Amendment Supplementary Act (XXI of 1929) which runs as follows—

15 (2) *Notwithstanding anything contained in section 9 of this Act, in the Presidency of Bombay and such other territories as the Governor General in Council may, by notification in the Gazette of India, specify in this behalf, a suit by a mortgagee for foreclosure or sale on a mortgage by deposit of title-deeds may be instituted within two years from the date of the commencement of this Act,*

or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first; and no such suit instituted within the said period of sixty years and pending at the date of the commencement of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that the twelve years' rule of limitation is applicable.

[N. B. "Two years"—1st April 1932.]

This section was added on the motion of Sir D. F. Mulla, who observed: 'This amendment relates to a mortgage by deposit of title deeds. As to mortgages of this kind there has been a conflict of opinion between the various High Courts of India. It has been held by the High Court of Bombay that a mortgage by deposit of title deeds stands on the same footing as an English mortgage. On the other hand it has been held by the High Courts of Calcutta and Madras that a mortgage by deposit of title deeds is no more than a charge. If it stands on the same footing as an English mortgage the period of limitation is 60 years, as provided by Article 147 of the Limitation Act. On the other hand, if it is merely a charge, the period of limitation is 12 years as provided by Article 132 of the Limitation Act. What is proposed to be done is to put a mortgage by deposit of title deeds on the same footing as a charge, following in this respect the view taken by the High Courts of Calcutta and Madras. So Article 132 is proposed to be amended by adding in it a clause to the effect that a suit on a mortgage by deposit of title deeds will be governed by this Article and the period of limitation will be 12 years only. But in Bombay it has been held that it stands on the same footing as an English mortgage with the result that it was decided about three months ago by the High Court of Bombay that a suit by such a mortgagee may be brought at any time within sixty years from the date when the mortgage money becomes due. With a view to give a chance to such a mortgagee in Bombay, it has become necessary to make the proposed amendment, and the effect of the proposed amendment is to give a period of two years from the date of the passing of the Bill to the holder of such a mortgage, and if the period of 60 years expires before the period of two years, then the suit will have to be brought within that period. In fact, what is proposed to be done now is what was done several years ago when section 31 of the Indian Limitation Act was enacted.'—*Legislative Assembly Debates*, 11th September 1929.

[The Legislature would have done better by inserting this saving provision into the Limitation Act itself, instead of placing it at the end of the T. P. Amendment Supplementary Act.]

133. [Omitted by Act I of 1929.]

This Article has been omitted from this place but re-enacted as Art. 48A. See notes thereunder.

134.—To recover pos- Twelve When the transfer be-
session of immove- years. comes known to the
able property con- plaintiff.

given at the time of the transfer but passed subsequently to the transferee—*Chetty Firm v. Md. Kasim*, 3 Rang. 367, A.I.R. 1925 Rang. 377, 90 1011

Since the transfer contemplated by this Article is a transfer of possession, it presupposes that the transferor-mortgagee must have been in possession of the mortgaged property at the time he made the transfer. But the possession which the transferor has at the time of the transfer need not necessarily be acquired *under the mortgage* originally made in his favour. Even if the mortgage was a simple mortgage and if the mortgagee subsequently gets possession of the mortgaged property or acquires it, as for example by a purchase in execution of a simple money decree obtained by another creditor, the Article will still apply if it is established that at the time the transfer was made the mortgagee was in possession no matter under what title—*Naunihal v. Skinner*, 47 All. 803, 23 A. 691, A.I.R. 1925 All. 707 (per Lindsay J.). But *Kanhaya Lal* [J.] is of opinion that the transferor-mortgagee must have obtained possession (of the mortgaged property) *under the mortgage*, and that if the mortgagee acquires possession in some other capacity, the transfer of possession would not be deemed to have been made in that capacity in which it was acquired and such acquisition could not be attributed to the mortgage, where the mortgage itself was a simple mortgage or a mortgage not entitling the mortgagee to possession by virtue of its incidents or terms. But this opinion is no longer correct in view of 51 All. 367 (P.C.) cited in 562 below.

Execution sale—Execution sale is not a 'transfer'; therefore Article 100 does not apply to a suit against a person who purchased the property at a sale in execution of a decree against the trustee or mortgagee—*Paras Ram v. Lalman*, 7 I.C. 570 (All.), *Charu Chandra v. Nal Chandra*, 50 Cal. 49 (63), A.I.R. 1923 Cal. 1, 36 C.L.J. 35; *Kalida Kanhaya*, 11 Cal. 121 (P.C.), *Chintamani v. Sarupse*, 15 Cal. 703 (so assumed); *Subbaya Pandaram v. Mahammad Mustapha*, 32 M. 85, 40 I.C. 50, *Kannuswami v. Muthusami*, 5 L.W. 250, 38 I.C. 1917 M.W.N. 5, *Ram Piary v. Budh Sen*, 43 All. 164 (168); *Pand. Vithu*, 19 Bom. 140 (144), *Sobhag Chand v. Bhaichand*, 6 Bom. 193 (2); *Mahomed Mohsin v. Mahomed Abid*, 22 O.C. 72, 52 I.C. 159; *Sheo v. Mahipal*, 2 A.L.J. 234; *Bhagwan Sahai v. Bhagawan Din*, 9 All. 191; *Mahomed Moosa v. Kaki Fatahulla*, 19 S.L.R. 268, A.I.R. 1925 Sind 79 I.C. 466. Where in execution of a money-decree, the immovable property of the judgment-debtor, in which his real interest is that of a mortgagee, is attached and sold, the auction-purchaser cannot be regarded as a purchaser within the meaning of this Article, even though the property was sold as the property of the judgment-debtor without limitation of his interest therein—*Ahmed Kuli v. Raman*, 25 Mad. (F.B.) (overruling *Muthu v. Kambalinga*, 12 Mad. 316, at p. 318, where this Article was held to apply equally to an auction sale as well as to a private sale).

In the recent Privy Council case of *Subbaya Pandaram v. Mahammad Mustapha*, 46 Mad. 751 (757), the Judicial Committee were of opinion

interest or only a mortgage-interest is a question of intention—*ibid*; *Lakshmana v. Sankara Pandiam*, 51 M.L.J. 451, A.I.R. 1926 Mad. 311, 93 I.C. 276.

In order to make this Article applicable, the transferee should take a transfer of an *absolute* and not of a restricted title. If the transferee does not profess or intend to take the transfer of an absolute interest or anything more than the qualified interest which the transferor is competent to alienate, there is no occasion for this Article to apply—*Rumkanai v. Sri Sri Hari Narain*, 2 C.L.J. 546. This Article is intended to protect a transferee who had reasonable grounds for believing that his transferor had the power to convey and did convey an absolute interest. This Article applies where the transferee is a person who takes the transfer under the representation made to him and in the belief that it is an absolute title which he is taking—*Husaini v. Husain*, 29 All. 471; *Ram Piar v. Budh Sen*, 43 All. 164 (167), *Taluqdari Settlement Officer v. Akurj Abhram*, 46 Bom. 993, 24 Bom. L.R. 762, A.I.R. 1922 Bom. 350, 68 I.C. 487, *Manavikraman v. Ammu*, 24 Mad. 471 (F.B.); *Mathu v. Kambalinga*, 12 Mad. 316 (318), *Keshav v. Gajurkhan*, 46 Bom. 903 (906), *Pandu v. Vithu*, 19 Bom. 140 (144), *Radhanath v. Gisborne*, 14 M.I.A. 1, *Mahabir v. Sheoraj*, 9 O.C. 373; *Dalal v. Gur Prasad*, 12 O.C. 84, 2 I.C. 250, *Bhagwan v. Bhagwan*, 9 All. 97 (102); *Azim v. Mahmud*, 124 P.R. 1883. The transfers contemplated by this Article are transfers for value in excess of the limited powers of the trustee or the mortgagee—*Narain Das v. Haji Abdur Rahim*, 47 Cal. 866 (880). The transfer of mortgaged property contemplated by this Article is something other than an express transfer of the original mortgage; it is a transfer by the mortgagee purporting to transfer a larger interest than that given by the mortgage, or at any rate an interest unencumbered by a mortgage—*Skinner v. Naunihal*, 51 All. 367 (P.C.), 56 I.A. 192, 27 A.L.J. 566, 33 C.W.N. 761 (767), 117 I.C. 22, A.I.R. 1929 P.C. 158. Thus, where the defendant's vendor purported to transfer the full ownership when in point of law he had only a mortgagee-right to transfer, the case is governed by Article 134—*Rego v. Abbu Beari*, 21 Mad. 151; *Mirza Yar Ali Beg v. Danish Ali*, 2 O.L.J. 483, 32 I.C. 314.

A purchaser for valuable consideration from a mortgagee by conditional sale, who sold the property as though he were the ostensible owner of it, comes under this Article—*Vishnu v. Balaji*, 12 Bom. 352 (358). Where the trustee of a muth property granted a permanent lease of the property, which he was not competent to do, *held* that the lessor intended to grant, and the lessee intended to acquire, an interest greater than the transferor was competent to alienate, and all the requirements of Article 134 (now Art. 134A) were complied with—*Baluswami v. Venkataswamy*, 40 Mad. 745 (751). This Article protects a person who happening to purchase from a mortgagee had reasonable grounds for believing and did believe that his vendor had the power to convey and was conveying to him an absolute interest and not merely the interest of a mortgagee—*Bhagwan Sahai v. Bhagwan Din*, 9 All. 97. A mortgagee who took a

mortgage from a person who was merely a mortgagee of the lands but who mortgaged them as if he were the complete owner, is entitled to the benefit of this Article—*Manavikraman v Ammu*, 24 Mad 471 (483) (F.B.), *Husaini v. Husain*, 29 All. 471 (479); *Bagas Umarji v. Nathabhai*, 36 Bom. 146

So also, where the purchaser at the time of the purchase believes that his transferor is an absolute owner of the property transferred, but finds later on that his transferor was only a mortgagee and not the owner of the property, he is none the less a transferee of an absolute interest, and is entitled to the benefit of this Article—*Keshav Raghunath v Gafurkhan*, 46 Bom. 903 (907), 24 Bom L R 319, 67 I C. 308, A I R. 1922 Bom. 234. A person who has purchased a right which he honestly believed to be a full proprietary right, and which was so described in the sale-deed, can claim the benefit of Art 134, even though by the exercise of due diligence he might have discovered that his transferor was only a mortgagee, mere constructive notice without actual knowledge not being sufficient to deprive the purchaser of the benefit of this Article—*Bijai Partab v. Raghuraj*, 25 O C 115, A I R 1922 Oudh 7, 67 I.C. 572

But this Article does not apply where the mortgagee transfers his interest as such, i.e. where the defendants (transferees) claim a transfer of the mortgagee-interest and not of the entire property in the land—*Savalaram v. Genu*, 18 Bom. 387, *Charu Chandra v. Nahush Chandra*, 50 Cal. 49 (62), A I R 1923 Cal 1, 36 C L.J. 35, *Mirza Yar Ali Beg v Danish Ali*, (supra), *Sri Ram v. Najibullah*, 29 O.C. 353 (F.B.), 3 O W.N 674, A I R 1926 Oudh 547, 97 I.C 874. Thus, where the mortgagee transfers his mortgagee-rights as such, the transferee stands in no better position than the transferor; consequently, the mortgagor has sixty years under Art 148 within which to bring a suit for redemption against the person who purchases only the mortgagee-rights from the mortgagee—*Drigpal v. Kallu*, 37 All 660 (661); *Muthu v. Kambalinga*, 12 Mad 316 (318); *Bhagwan Sahai v Bhagwan Din*, 9 All. 97 (102); *Azim v. Mahmud*, 124 P R 1883, *Ram Piar v. Budh Sen*, 43 All. 164 (167), *Vishwanath v. Tukaram*, 27 Bom L.R. 661, A I R. 1925 Bom 417, 89 I C. 189, *Tairamiya v Shibelisaheb*, 44 Bom. 614 (618); *Gomti Misra v Deota Din*, 26 O.C 197, 77 I.C. 737, A.I R 1924 Oudh 44; *Ma Myat Gyi v Ma Ma Nyan*, 2 Rang 561 (566). Where both the transferor and the transferee knew that the transferor was unable to confer a higher right than that of a submortgagee on the transferee, and neither the transferor nor the transferee honestly believed that the full ownership was being passed, the mere insertion of some words in the document which might be construed as if they were the words of a person possessing such right as would enable him to pass a title of full owner to his transferee, while the consideration was the consideration of a mortgage and not of sale, did not confer full ownership on the transferee. Under these circumstances, it cannot be maintained that there was an *animus* to pass anything more than an assignment of the mortgagee-rights which were vested in the transferor—*Lakshmana v. Sankarapandiam*, 51 M.L J. 451, 93 I C. 276, A.I.R. 1926 Mad. 311.

In order to get the benefit of this Article, the *onus* lies on the transferee to shew that he is the transferee of an *absolute* title and not merely of the mortgagee's rights in the property—*Vythulingam v Kuthisavattah*, 29 Mad 501, *Veerabadra v Veerappa*, 15 I.C. 609 (610). If on the other hand, the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention—*Muthaya v. Kanthappa*, 34 M.L.J. 431, 45 I.C. 975. Where the question whether the mortgagee was transferring a mortgage-interest or an absolute interest finds no answer from the wording of the deed itself, it would be a natural presumption that what he transferred was the right which he possessed, namely the mortgagee's right—*Puttu Lal v. Ram Chandra*, 103 I.C. 255, A.I.R. 1927 All. 689.

564. Transfer for valuable consideration :—The expression 'transferred for a valuable consideration' in this Article is in contra-distinction to a mere volunteer—*Ramkanai v. Sri Sri Hari Narayan*, 2 C.L.J. 1546; *Bakunthanath v. Ahmedulla*, 34 C.W.N. 961 (963); *Maluji v Fakirchand*, 22 Bom 225 (228). If the transferee is not a transferee for valuable consideration, a suit against him is not barred by any length of time by virtue of sec 10—*Chettikulam v. Srranga*, 26 M.L.J. 537, 24 I.C. 369. Thus, Article 134 does not apply to a case of gift—*Sri Ram v Matwala*, A.I.R. 1923 Lah. 219, 71 I.C. 577.

A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other—*Currie v. Misa*, (1875) L.R. 10 Exch. 153 (162).

A grant of a permanent lease is a transfer for a value consideration, the annual rent being the consideration—*Rameshwar v. Sri Sri Jiu Thakur*, 43 Cal. 34 (43), *Baluswamy v Venkataswamy*, 40 Mad. 745 (749); *Zafar Ali v Kishen Chand*, 51 I.C. 795, 99 P.R. 1919, *Ram Kanai v Sri Sri Hari Narain*, 2 C.L.J. 546, *Rama Reddi v. Ranga Dasan*, 49 Mad. 543, A.I.R. 1926 Mad 769, 96 I.C. 371. But the Privy Council has laid down that a permanent lease of a trust property is not a transfer for valuable consideration—*Vidya Varuthi v. Balusami*, 44 Mad. 831 (854) (P.C.), followed in *Lakshminarayana v. Rajamma*, 21 L.W. 256, 95 I.C. 1002, A.I.R. 1925 Mad. 796. A gift of a portion of the temple property to the defendants in consideration of their performing some recurrent religious services at the temple, is a transfer for a valuable consideration within the meaning of this Article—*Ramacharya v. Shrinivasacharya*, 20 Bom. L.R. 441, 46 I.C. 19 (20).

Good faith—Notice :—In order to make this Article applicable it is not necessary that the purchaser should show that he purchased *bona fide*, in the sense of being without notice of the restricted nature of the transferor's title. This Article applies even though the alienee for value from a trustee or mortgagee takes the property with full knowledge that the alienor is acting in excess of his power—*Narain v. Sardul*, 95 I.C. 699.

(Lah.); *Pandu v Vithu*, 19 Bom 140 (144), *Yeta Ramji v Balakrishna* 15 Bom. 583 (585), *Hargwan v Baldeo* 127 P R 1904 (F B), *Venku v Ramachandrayya*, 49 Mad 29, 49 M L J 634, A I R 1926 Mad 81, 92 I.C 342, *Kannuswami v Muthuswami*, 5 L W 250, 1917 M W N 5, 38 I.C 194. If he is a purchaser for value, and takes a transfer of an absolute interest, that is sufficient to bring the case under this Article. The fact that he knew that his vendor was selling more than he was competent to transfer does not take the case out of this Article. The material point is not what the transferee knows but what he takes. Knowledge of the limited nature of the transferor's title will not disentitle the transferee from taking advantage of this Article though it may be an important piece of evidence in determining what interest the transferee took—*Baluswami v Venkataswami*, 40 Mad 745 (750), *Muthaya v. Kanthappa*, 34 M L J 431, 45 I.C 975. Where a deed of transfer was a sale-deed and what was bargained by the transferee was also an absolute sale, and the consideration that was paid by him was full price for sale, Article 134 would apply, even though he knew that his transferor had only a mortgagee-interest—*Venku v Ramachandrayya*, supra. The fact that the transferee had notice that her vendor was selling to her a *debutter* property (now falling under Art 134A), would not preclude her from being regarded as a purchaser for valuable consideration—*Shama Charan v Abhiram Goswami*, 33 Cal 511. This Article refers to purchasers from a trustee for valuable consideration and is not restricted to purchasers in good faith. When the Limitation Act of 1871 was replaced by the Act of 1877, the Legislature omitted the words "in good faith" and the conclusion is irresistible that this alteration was made designedly with a view to protect a purchaser for valuable consideration whether such purchaser had or had not notice of the trust or mortgage at the time of transfer—*Ramkanai v. Sri Sri Hari Narain*, 2 C.L.J 546, (552), 38 Cal. 526 (531), *Baikuntha v. Ahmedulla*, 34 C.W.N. 961 (964); *Subbaya v. Mahammad Musthapa*, 32 M.L.J 85, 40 I.C. 50; *Keshav v. Gafurkhan*, 46 Bom 903 (907), 67 I.C 308; *Venku v. Ramachandrayya*, 49 Mad. 29, 49 M.L.J. 634, A.I.R 1926 Mad. 81; *Narain Das v Haji Abdur Rahim*, 47 Cal. 866 (878), 24 C.W.N. 690, *Dal Singh v. Gur Prasad*, 12 O.C. 84, 2 I.C 250, *Sri Ram v Najibullah*, 3 O.W.N. 674 (F.B.), A.I.R. 1926 Oudh 547, 29 O.C. 353, 1 Luck. 423. The mortgagee may be dishonest; the purchaser may not make any enquiry as to his vendor's title; the mortgagor may be ignorant of the sale of his property by the mortgagee; but these facts no longer affect the rights of the purchaser who has given valuable consideration. Article 134 of the Limitation Act of 1871 required good faith on his part. That condition was however removed by the Act of 1877 and is not reimposed by the Act of 1908—*Keshav Raghunath v. Gafurkhan*, 46 Bom. 903 (908), 67 I.C. 308, A.I.R. 1922 Bom. 234, *Baiva Khan v. Bhiki*, 9 Bom. 475. In this respect a transfer by a trustee stands on the same footing as a transfer by a mortgagee—*Baikuntha v. Ahmedulla*, 34 C.W.N. 961 (964).

But the Allahabad High Court dissents from this view and holds that the omission of the words "in good faith" makes no difference in the law

565. Suits under this Article:—As a result of the insertion of Arts. 134A and 134B, the scope of the present Article has been much restricted, and it applies only to mortgaged property, and to trust property of a secular character. A suit by the succeeding manager of endowment property to set aside a transfer made by the preceding manager and to recover the trust property is no longer governed by this Article or Article 144, but falls under Art. 134B.

A suit for joint possession of trust property brought by a trustee against a co-trustee and an alienee of the trust property from the latter is governed by this Article or Art. 144—*Shadi v. Abdur Rahman*, 1 Lah. 66 (68), 51 I.C. 755.

A suit for redemption of a mortgage with possession, brought against a transferee who has purchased from the mortgagee for value and in the belief that it is not a mortgage but an absolute title, is essentially a suit to recover possession within the meaning of this Article, although it is framed as a suit for redemption—*Lakshmi Das v. Badla*, 102 I.C. 135, A.I.R. 1927 All. 807.

A Hindu reversioner instituted a suit in 1914 to recover possession of certain lands which had been usufructuarily mortgaged by the last male owner in 1866, and had been sold for consideration by the mortgagee in 1900 after the death of the last male owner and during the lifetime of his daughter who had inherited the estate and died in 1906. Held that the suit was governed by Article 134 and not 141, and was barred. Article 141 did not apply as the mortgage had been created not by the female owner (daughter) herself but by the last male owner—*Sesha Naidu v. Periasami*, 44 Mad 951 (958), 41 M.L.J. 163, 68 I.C. 734. But where a mortgage was executed by a person who had only a life-interest in the property, and the mortgagee sold the property as absolute owner, and then after the death of the life-interest holder, the remainderman brought a suit for redemption and possession, held that the suit did not fall under Art. 134, as the original mortgagee was a mortgagee of a limited title only. Had the mortgagor an absolute title at the time when the mortgagee purported to convey the property as absolute owner, the case would have been brought within Art. 134. The suit fell under Art. 148—*Skinner v. Naunihal*, 51 All. 367 (P.C.), 33 C.W.N. 761 (768), 27 A.L.J. 566, 31 Bom. L.R. 854, 30 L.W. 76, A.I.R. 1929 P.C. 158, 117 I.C. 22 (reversing *Naunihal v. Skinner*, 47 All. 803).

This Article applies to a suit against the transferee of the mortgagee. If the mortgaged property is sold by the mortgagee but is repurchased by him from the person to whom he had sold it, the mortgagor can redeem the property from him within the period prescribed by Article 148, Article 134 cannot apply, because he is not a transferee of the mortgagee but is the mortgagee himself, nor can he be treated as an innocent transferee without notice—*Kalu Deva v. Rupchand*, 44 Bom. 848 (851), 22 Bom. L.R. 932, 58 I.C. 39.

566. Starting point of limitation.—Where the transferee took possession not at the date of transfer, but at some subsequent time, the Calcutta High Court held that limitation ran from the date of

transfer and not from the time when the transferee took possession of the property—*Narain Das v. Haji Abdur*, 47 Cal. 866 (882). But according to the Madras High Court, time ran not from the the date of transfer but from the date when the transferee subsequently took possession under the transfer—*Seeti Kutti v. Kunhi Pathumma*, 40 Mad. 1040 (1054) (F.B.). See Note 561, under sub-heading *Transfer with possession*.

These cases are no longer good law in view of the amendment of the third column, under which the date *when the transfer becomes known to the plaintiff* is now fixed as the starting point of limitation. The reason of the amendment is thus stated :—

“We consider on the whole that the date when the plaintiff obtains knowledge of the transfer he seeks to attack is the most suitable date from which limitation should run. If limitation runs from the date of the transfer itself, it is a simple matter for a dishonest trustee and a colluding transferee to conceal the fact of the transfer until the period of limitation has expired. The position is not much improved if the period is made to run from the delivery of possession, for even the fact of possession of the nature to give rise to a cause of action can also be concealed, for instance, land may be given out originally on lease from year to year in the ordinary course of management, and then collusively sold, without any one interested knowing that the vendee's possession is other than that of a lessee from year to year. We therefore recommend that the period should run from the date when the transfer becomes known to the plaintiff”—*Report of the Select Committee* (Gazette of India, 1927, Part V, p. 258).

567. Effect of bar of limitation :—If a mortgagee in possession claiming to be absolutely entitled to the property mortgages it with possession in 1894 to another person (defendant No. 5), and the original mortgagor (plaintiff) does not bring a suit under this Article to recover the possession of the property from the defendant No. 5 within 12 years from 1894, the defendant No. 5 will acquire the full interest of a mortgagee, and the plaintiff (original mortgagor) will not be entitled to redeem the property from the original mortgagee without redeeming the defendant No. 5—*Bagas Umarji v. Nathabhai*, 36 Bom. 146, 12 I.C. 737; *Taluqdari Settlement Officer v. Akuji*, 24 Bom. L.R. 762, A.I.R. 1922 Bom. 350. In such a case, Art. 134 coupled with section 28 having given particular legal validity to the subsequent mortgage (i.e., the mortgage by the mortgagee), the original mortgagor would be barred by Art. 134 from redeeming the property from the original mortgagee alone by disregarding the subsequent mortgage. The subsequent mortgagee has a right to hold it until the debt is paid—*Maluji v. Fakirchand*, 22 Bom. 225 (229).

When a mortgagee sells the mortgaged property ostensibly as owner and for valuable consideration, and no suit is brought under this Article by the mortgagor, within 12 years, the right of the purchaser becomes

unassailable—*Keshav v. Gafurkhan*, 46 Bom. 903 (908); *Krishnaji v. Sadanand*, 26 Bom L.R. 341, A.I.R. 1924 Bom. 417, 80 I.C. 763.

134A.—To set aside a Twelve When the transfer be-
transfer of immove- years. comes known to the
able property com- plaintiff.
prised in a Hindu,
Muhammadian or
Buddhist religious
or charitable endow-
ment, made by a
manager thereof for
a valuable consi-
deration.

567A. This Article has been added by the Indian Limitation Amend-
ment Act I of 1929 "It provides for suits by persons interested in the
endowment (who would be called beneficiaries if the endowment were
a trust) to set aside alienations of the endowment property made by the
manager. (Such suits are generally brought under sec. 92 C. P. Code,
1908). In these cases the plaintiff is not entitled to possession, and
cannot therefore claim to recover the property but he may sue to have
the transfer set aside and for any consequential relief which may be
adapted to the circumstances of the case In this class of cases we
propose a new Article 48B for moveable property, and Art. 134A for
immoveable property"—*Report of the Select Committee* (Gazette of India,
1927, Part V, p. 258).

Prior to the insertion of this Article, it was held that a suit brought
under sec 92 C. P. Code by the disciples of a *mutt* as persons repre-
senting the beneficiaries of the *mutt* or as persons interested in the *mutt*
for the cancellation of an improper alienation made by the *mohunt* of
the *mutt* property, and for its restoration to the *mutt*, was held to be
governed by Article 134 or 144—*Chidambaranatha v. Nallasiva*, 41 Mad.
124 (129), 33 M.L.J. 357, 42 I.C. 366. Similarly a suit brought under
sec. 92 C.P. Code, for the dismissal of a *mohunt* and for recovery
of the property of the idol from the hands of a third party to whom
the same has been improperly alienated, with a prayer that the property
may be delivered to the possession and custody of the person who may
be appointed *mohunt*, was held to be governed by Article 134—*Sajedur
Raja v. Gour Mohun*, 24 Cal 418 (429). These cases would now fall
under the present Article.

The object of this Article is to give additional protection by the
beneficiaries of an endowment in cases where the successors of the
alienating manager may fail through neglect or collusion to bring a suit
to impeach the alienation (under Art. 134B). If, however, the successors
of the alienating manager have allowed the suit under Art. 134B to
become barred, a suit brought under Art. 134A by the beneficiaries to

set aside the alienation would be infructuous, by the operation of sec. (Read the *Minute of Dissent* in *Gazette of India*, 1928, Part V, pp. 89-

134B.—By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immoveable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration. Twelve years. The death, resignation or removal of transferor.

567B. This Article has been inserted by the Indian Limitation Amendment Act (1 of 1929). It contemplates a suit by the present manager of an endowment property (immoveable) attacking an alienation made by a predecessor. If the property is moveable, Art. 134C applies.

The suit contemplated by this Article was formerly held to be governed by Article 134—*Dattagiri v. Dattatraya*, 27 Bom. 363 (36); *Sagun Balkrishna v. Kaji Hussien*, 27 Bom. 500 (513); *Nilmony Jagabandhu*, 23 Cal. 536 (544), *Behari v. Muhammad*, 20 All. 482 (F.B.); *Narayan v. Sri Ram Chandra*, 27 Bom. 373 (377); *Manmatha v. Anna*, 27 C.L.J. 201, 44 I.C. 567; *Narain Das v. Haji Abdur Rahim*, 47 C. 866; *Ishwar Sham Chand v. Ram Kanai*, 38 Cal. 526 (P.C.).

As regards the starting point of limitation, a distinction was drawn between cases of sale of the endowment property by the manager, and cases of permanent lease granted by him. In a suit by the present manager to recover possession of property sold by the preceding manager, time ran from the date of alienation (and not from the date of the plaintiff's appointment as the succeeding manager)—*Manmatha v. Anna*, supra; *Shadi v. Abdur Rahim*, 1 Lah. 66 (68); *Deivasikamani Valliammal*, 37 M.L.J. 231, 52 I.C. 914; *Nilmony v. Jagabandhu*, supra; *Har Gian v. Baldeo*, 127 P.R. 1908 (F.B.); *Dattagiri v. Dattatraya*, supra; *Sagun Balkrishna v. Kaji Hussien*, supra; *Pandurang v. Dnyan*, 36 Bom. 135; *Damodar v. Lakhan*, 37 Cal. 885 (894) (P.C.); *Badri Kailash*, 5 Pat. 341. But where a permanent lease was granted by the manager, the lease was valid during his lifetime, and the possession of the property by the lessee was not adverse to anybody; but after the manager's death, the succeeding manager would be at liberty to institute a suit for recovery of the estate, and time (Art. 144) ran against him as from the time when he assumed the office of manager—*Subbai*

Pandaram v. Mahammad Mustapha, 46 Mad. 751 (756) (P.C.), *Abhiram v. Shyama Charan*, 36 Cal. 1003 (1015) (P.C.), followed in *Ishwar Shyam Chand v. Ram Kanai*, 38 Cal. 526 (P.C.); *Muthusamier v. Sree Sreemethanithi*, 38 Mad. 356 (362), *Vidya Varuthi v. Balasami*, 44 Mad. 831 (855) (P.C.); *Mahomed v. Ganapathi*, 13 Mad. 277 (280); *Govinda Rao v. Chinnathurai*, 49 M.L.J. 640, A.I.R. 1926 Mad. 193, 91 I.C. 377; *Chinnathurai v. Govinda Rao*, 53 M.L.J. 306, A.I.R. 1927 Mad. 850, 104 I.C. 125. In a case of mortgage by a preceding mohunt, it was held that time ran from the date of the plaintiff's appointment as successor to the office of mohunt—*Bashashar v. Natha Singh*, 30 P.R. 1908 (F.B.), 102 P.L.R. 1908.

Under the present Article, time runs neither from the date of transfer nor from the date of plaintiff's succession to office, but from the death, resignation or removal of the transferor in all cases of transfer, whether by way of sale, mortgage or permanent lease. If the period of limitation is made to start from the date of plaintiff's succession to the office of manager, it is open to the criticism that "as this Article gives each successive manager a right to sue, it really imposes no definite period of limitation, but will lay the successors of a transferee for value open to the risk of a suit perhaps after several generations, after all chance of obtaining evidence has disappeared. We admit the cogency of the criticism, and we propose to put a definite limit of time upon the bringing of suits by managers to set aside transfers made by their predecessors. We propose to take as the starting point the death, resignation or removal of the transferring manager"—*Second Report of the Select Committee* (Gazette of India, 1928, Part V, p. 87).

In the Privy Council case of *Lal Chand v. Ramrup*, 53 I.A. 24, 5 Pat. 312, 30 C.W.N. 721 (727), 7 P.L.T. 163, 93 I.C. 280, A.I.R. 1926 P.C. 9 (reversing *Mohant Ramrup v. Lal Chand*, 1 Pat. 475), the Judicial Committee had laid down that time ran from the date of the alienor's death. The same view was taken in a Bombay case—*Narayan v. Sri Ramchandra*, 27 Bom. 373 (378). These rulings will now stand.

134C.—By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of moveable property comprised in the endowment which has been sold by a previous manager for a valuable consideration. Twelve years. The death, resignation or removal of the seller.

This Article has been added by the Indian Limitation Amendment Act (I of 1929). It comprises suits of the same description as contemplated by Art. 134B, but applies to *moveable* property, while the preceding Article applies to *immoveable* property.

135.—Suit instituted in Twelve Years. When the mortgagor's a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged. right to possession determines.

568. Scope :—This Article is not confined to suits against the mortgagor himself, but applies to a suit against the mortgagor as well as against a stranger. Article 146 which provides for suits for possession by mortgagees in High Courts contains the words "from the mortgagor" but these words are omitted from Article 135. Consequently Article 135 applies to a suit against a person other than the mortgagor—*Vyapuri v. Sonamma*, 39 Mad 811 (829). Thus, in *Shurnomoyee v. Srinath*, 12 Cal. 614 (620), and *Srinath v. Khetter*, 16 Cal. 693 (P.C.), this Article was applied to a suit against the purchaser from the mortgagor. This Article applies not only where the suit is filed against the mortgagor, but also against a person deriving title from the mortgagor under a prior mortgage—*Gokul Prasad v. Sukra*, 11 O.L.J. 269, 81 I.C. 241, A.I.R. 1924 Oudh 374. The Punjab Chief Court is of opinion that this Article applies only to a suit brought by a mortgagee against the mortgagor or a person deriving title from the mortgagor. It has no application to a suit for possession by a mortgagee against a stranger, to such a suit Art. 142 would apply—*Channan v. Mela Ram*, 117 P.R. 1919, 50 I.C. 762.

569. Cases :—This Article cannot apply when the mortgagee has got possession after the mortgagor's right to possession determined. Therefore where the mortgagee obtained possession under an usufructuary mortgage, but subsequently lost possession, a suit by the mortgagee to recover possession of the mortgaged property from the mortgagor was not governed by Article 135. In such a case, Article 142 or 144 would apply—*Anjuman v. Hisamal*, 9 N.L.R. 179, 22 I.C. 65. A mortgagee by conditional sale, who was put into possession but was subsequently wrongfully dispossessed of the mortgaged property, can maintain a suit for possession of the same (Art. 142) though his claim to foreclosure may be barred—*Aman v. Azgar*, 27 Cal. 185 (187). A suit by a mortgagee for possession of land mortgaged to him by a registered deed which provided that the mortgagee was to hold possession of and cultivate the land, paying the Government revenue, and which also contained a recital that possession had in fact been given though it was never in fact given, was governed by Article 135 and not by Article 113, because it was not a suit to compel the owner of the land to convey a right of possession, as that had already been done, but to obtain possession of the land the

right to which had previously been conveyed by the registered deed—*Ram Chand v. Gyan Chand*, 134 P R 1893. A deed of mortgage dated February 1875 contained a stipulation that the whole of the mortgage money should be repaid on the 14th May 1875, and in default the mortgagee should get possession. The mortgagee filed a suit on the 10th May 1887 for possession. *Held* that the suit was not one for specific performance of the agreement of 1875, but was governed by Article 135—*Kanhaya Lal v. Mohru*, 96 P R 1890. Where a mortgage-deed contains no provision for possession being taken by the mortgagee, and foreclosure-proceedings taken by the latter under Reg XVII of 1806 are found to be invalid, the mortgagee does not become entitled to possession and cannot sue for possession; consequently this Article cannot apply—*Nilcomol v. Kamini*, 20 Cal 269 (272).

570. Starting point of limitation :—Where the mortgagor mortgaged the property with possession but remained in possession in spite of the mortgage, his right to possession determined on the very date of the mortgage, and the mortgagee was at once entitled to possession, the mortgagee must sue for possession under this Article within 12 years from that date, and the fact that the possession of the mortgaged property was taken in the meantime by a prior mortgagee did not stop limitation from running (sec. 9) or entitle the plaintiff to deduct the period during which the prior mortgagee was in possession—*Hukum Chand v. Shahab Din*, 4 Lah. 90, A.I.R. 1924 Lah. 40, 71 I.C. 495.

Under this Article, time begins to run from the day when the mortgagor's right to possession determines, and this clearly means 'when his right to possession, according to the terms of the mortgage-deed, determines'. The cause of action in a suit contemplated by this Article is the failure of the mortgagee to get possession when he was first entitled to get possession—*Anjuman v. Hisamal*, 9 N.L.R. 179, 22 I.C. 65. If the mortgage-deed provides that on default in payment of the mortgage-money within the date fixed in the deed, the mortgagee would be entitled to possession, the period of limitation for a suit by the mortgagee for possession runs from the date of default, because the mortgagor's right to possession ceases from that date—*Kanhaya v. Mohru*, 96 P.R. 1890; *Modun Mohan v. Ashad Ally*, 10 Cal 68 (72); *Shurnomoyee v. Srinath*, 12 Cal. 614 (620).

Where under the terms of a mortgage-deed the mortgage-money was made payable by certain stated instalments, and it was stipulated that on the mortgagor's failure to pay six such instalments the mortgagee was to be placed in possession of the properties, *held* that limitation for the mortgagee's suit for possession ran from the date of the mortgagor's failure to pay six instalments—*Bishan Lal v. Khushali*, 91 P.R. 1908, 4 I.C. 921.

Before the passing of the Transfer of Property Act, a mortgagee by conditional sale was entitled to possession after the year of grace, where the proceedings were taken under Reg XVII of 1806. If the mortgagee

amongst others that the property would not be transferred by the mortgagor so long as any principal or interest remained due, and that if it was transferred, the mortgagees without waiting for the expiry of the six years might bring a suit for recovery of the principal and interest and might also get possession "by completion of the sale." Nothing was paid by the mortgagor and in 1867 part of the mortgaged property was transferred. Proceedings under section 8 of Regulation XVII of 1800 were not taken by the mortgagees. In 1910, the representatives of the mortgagees instituted a suit for foreclosure. It was held that the cause of action accrued in 1867, and the suit was barred—*Bansgoral v. Sheo Ram*, 38 All 97 (102), 32 I C 95. Where the land usufructuarly mortgaged is situated on the bank of a river and is liable to submersion but was out of water at the date of the mortgage, a suit by the mortgagee for possession of the mortgaged property must be brought within 12 years from the date of the mortgage, and the fact that the land became submerged would not stop the period of limitation and revive it when the land afterwards emerged out of water—*Barket v. Relu Mal* 26 P L R 729, 92 I C. 178, A.I.R. 1925 Lah 627.

In case of a usufructuary mortgage, the mortgagor's right to possession determines on the date of the mortgage. If at the time the mortgagor makes the usufructuary mortgage, the property is in the hands of a prior mortgagee, still Article 135 applies to a suit for possession by the usufructuary mortgage, and time runs from the date of his mortgage. Under Article 135, it is immaterial whether the possession of the property mortgaged is held at the time of the mortgage by the mortgagor or by a mortgagor's right to possession ceases when he makes a fresh mortgage—*Husaini v. Ram Charan*, 18 O C. 280, 32 I C 341. But the Punjab Chief Court dissents from this ruling and holds that if a property which is already in the possession of a prior mortgagee is again mortgaged with possession, a suit by the subsequent mortgagee for possession is not maintainable until the prior mortgage is redeemed. Article 135 distinctly contemplates that the possession is with the mortgagor, limitation under Article 135 for a suit by the puisne mortgagee does not begin to run until the redemption of the first mortgage, and he is entitled to bring his suit for possession within 12 years from the date of redemption—*Budha v. Mul Raj*, 8 P.W R. 1919, 48 I C 916, dissenting from 18 O C 280.

136.—By a purchaser Twelve When the vendor is first
at a private sale for years. entitled to posses-
possession of im- sion.
moveable property
sold when the ven-
dor was out of pos-
session at the date
of the sale.

572. Scope :—Article 136 applies to suits brought by purchasers against third persons in possession of the land—*Lakshman v. Bishansingh*, 15 Bom. 261 (264); *Gajadhar v. Ram Lakshan*, 5 I.C. 273 (All)

Where a vendor was at the time of sale out of possession, and subsequently recovered possession, a suit by the vendee to recover possession from the vendor would be governed by Art. 144, and not by this Article, and time runs from the date of the vendor's recovery of possession and not from the date when the vendor was originally dispossessed—*Ram Prasad v. Lakhi Narain*, 12 Cal. 197 (199), *Syed Nyamtula v. Nana*, 13 Bom. 424 (428) In *Sheo Prasad v. Udai*, 2 All. 718, it was held that either Article 136 or Art 144 might apply.

This Article applies when the vendor is out of possession at the date of sale, if the vendor is in possession at the date of sale, such possession is adverse to the purchaser; and a suit by the latter to recover possession is governed by Article 144 and must be brought within 12 years from the date of sale—*Syed Nyamtula v. Nana*, 13 Bom 424 (428).

This Article cannot apply where the vendor is not entitled to possession, i.e., where the vendor's right to possession has become time-barred. Thus, where an order under sec. 335 C. P. Code 1882 has been passed against the vendor, and he has not sued for possession of the property within the period of one year prescribed by Article 11A, and then he sells the property to the plaintiff, a suit by the plaintiff to recover the property does not fall under Article 136 This Article applies to cases in which a time has arrived when the plaintiff can assert that his vendor has become entitled to possession, and that assertion it is impossible for the plaintiff to make as long as an order under sec. 335 C P. Code is in operation declaring that the vendor is not entitled to possession. In such a case, the plaintiff cannot evade the obstacle of Article 11A by having recourse to Article 136, as if that obstacle did not exist—*Mahadev v. Babi*, 26 Bom 730 (735).

573. Vendor —The expression 'vendor' means a vendor other than the auction-purchaser mentioned in Art. 138 In other words, this Article does not apply to a suit brought by a purchaser from an auction-purchaser who was out of possession at the date of sale, the property being in the possession of the judgment-debtor To such a suit Article 138 would apply, because the word 'auction-purchaser' in that Article includes a purchaser from an auction-purchaser—*Sati Prasad v. Jogesh*, 31 Cal. 681, 684 F.B. (over-ruling *Mohima v. Nabin*, 23 Cal. 49).

Where there have been transfers by successive vendors, who have all been out of possession, this Article may well be construed so as to include in the term 'vendor' the first of the series of vendors who was entitled to sue for possession—*Abbas v. Masabdi*, 24 I.C. 216 (Cal.)

Out of possession :—The expression 'out of possession' implies that some person is in possession adversely to the vendor—some person holding in a character incompatible with the idea that the ownership remained vested in the vendor—*Chintamani v. Hriday*, 29 C. L.J. 241, 51 I.C. 123;

Ganpat v. Ganpat, 2 N.L.R. 32; and the word 'possession' contemplates not only actual possession but also includes such possession as a member of a joint family is presumed to have in the family property until excluded therefrom—*Venkajja v. Rama Krishnamma*, (1911) 2 M.W.N. 175, 9 M.L.T. 397, 9 I.C. 495. Therefore, where the vendor sold to the plaintiff a share in a tank which she held jointly with other co-sharers, the mere fact that on some occasions the co-sharers caught fish in the tank and appropriated the same entirely for themselves does not prove that the vendor was out of possession. It is incumbent on the co-sharers to establish that they had set up a hostile title and excluded her from possession—*Chintamani v. Hriday*, (supra). If a property belonging to two tenants-in-common is in the possession of one of them, it does not follow that he is holding adversely to the other tenant-in-common, and that the latter is 'out of possession.' There must be evidence of ouster, that is to say evidence of denial by the tenant in possession of the right of the other tenant to a share in the profits of the property. It does not follow therefore that as soon as a receipt of all the profits by one tenant-in-common commences, the time is running adversely against the other tenant. It is only after continuous enjoyment by one tenant-in-common that a presumption may arise that he has denied the right of the other tenant-in-common to enjoy together with him the property—*Shivalingappa v. Satyava*, 23 Bom. L.R. 967, 64 I.C. 552, A.I.R. 1921 Bom. 77.

574. Starting point of limitation—A suit by a reversioner for possession after the death of a Hindu widow falls under Article 141, but a suit by an assignee from the reversioner, who was out of possession at the date of the sale, falls under this Article and not under Art. 141, and must be brought within twelve years from the date of the death of the widow, that being the date when the reversioner was first entitled to possession (under the provision of Article 136)—*Godadhar v. Harekrishna*, 8 C.W.N. 535 (538).

When a decree is passed declaring a person's right to the property, he is said to be entitled to possession on the date of the decree, and the period of limitation runs from that date—*Sheo Prasad v. Udoi Singh*, 2 All. 718.

In a suit by the purchaser of a share in joint family property, of which the vendor was not in possession, the *onus* lies on the purchaser to shew that his vendor's exclusion from possession was within twelve years before the institution of the suit—*Ram Lakhi v. Durga*, 11 Cal. 680 (683).

The words in the 3rd column ("when the vendor is first entitled to possession") relate to the *beginning of the dispossession* referred to in the first column, and the meaning of this Article is that if, supposing no sale had taken place, the vendor's title would have been alive at the time the vendee's suit is brought, such suit is not barred, but if on the other hand the vendor had been out of possession for more than 12 years at the date of the vendee's suit, such a suit would be too late, consequently, in the case of a suit contemplated by this Article, when the purchaser succeeds in showing that the exclusion of the vendor from possession took place

within 12 years of the institution of his suit, he succeeds in showing that his suit is within time. Thus, if a person (vendor) succeeds to property on his father's death, remains in possession thereof for 20 years, is then ousted by a trespasser, and 2 years after this, sells his rights, it cannot be contended in a suit brought by the vendee against the trespasser that in as much as the plaintiff's vendor was first entitled to possession on his father's death 22 years before, the suit is out of time. The period of limitation ran from the time when the dispossession began, i.e., two years before, when the vendor was first entitled to recover possession from the trespasser—*Partap Chand v. Sayida*, 23 All. 442 (445).

Onus of proof —It has been held in two cases that where the vendor was out of possession at the date of sale, and the vendee brings a suit for possession against the person in possession, it lies upon the plaintiff to show that his vendor was in possession at some period within 12 years prior to the date of the sale—*Deba v. Rohtagi*, 28 All. 479 (480); *Kashinath v. Shridhar*, 16 Bom 343 (346). (In these cases, Article 142 was applied, and it is not clear from the judgments why Article 136 was not applied) Mr Rustomji (3rd Edn., p. 534) comments on these cases as follows "These decisions are not intelligible and it is submitted that the plaintiff ought to go further and show that his vendor was in possession within 12 years of the suit, and not merely that he was in possession within 12 years of the sale. In other words, as was observed in 23 All 442, the plaintiff-vendee must show that supposing no sale had taken place, the vendor's title would have been alive when the vendee's suit is brought."

575. Suits under this Article :—A suit by a purchaser of the equity of redemption, for possession of the immoveable property, is governed by this Article, and the period begins to run from the date of redemption by the vendor-mortgagor, that being the date on which the vendor became entitled to possession—*Badri Mal v. Gopal*, 130 P.R. 1906

A suit by a purchaser from a member of a joint Hindu family who is alleged to have been out of possession at the date of sale, falls under Art. 136 and not under Art 127—*Venkayya v. Ramkrishnamma*, 9 M.L.T. 397, 9 I C. 495, *Ram Lakhi v. Durga Charan*, 11 Cal 680 (682)

A decree directed that A should obtain possession of a house from B, if he paid B a certain sum. B was not paid according to the decree, and A sold such interest as he had in the house to C. C then sued B for recovery of possession of the house on payment of the said sum. Held that the suit fell under this Article and not under Article 144. Further, the decree did not create any mortgage or charge and Article 148 did not apply—*Raghunath v. Katki*, 32 I C 353, 2 O L.J. 500.

137.—Like suit by a Twelve When the judgment-
purchaser at a sale years. debtor is first entitled
in execution of a to possession.
decree, when the

judgment-debtor
was out of possession
at the date of
the sale.

576. Scope:—Art 137 applies to suits brought by auction purchasers against *third persons* (i.e., persons other than the vendor or judgment-debtor) in possession of the land, in whose favour limitation runs against the purchaser in the same way as it would against the owner with whose right the purchaser is clothed; it does not apply to a suit against the judgment-debtor himself or his representatives *Lakshman v. Bisan Singh*, 15 Bom. 261 (264); *Gajadhar v. Ram Lakhan* 5 I C. 273; *Ram Lakhan v. Gajadhar*, 33 All 224 (227), 7 A L J 1184. If however the third person in possession of the land is a person who has no shadow of a title but is a mere trespasser or a stranger in the eye of the law, the suit brought against him by the auction-purchaser falls under Article 144 and not under Article 137, and the period of limitation runs from the time when the person had taken possession of the land—*Lakshman v. Bisansingh*, 15 Bom. 261 (264); *Lakshman v. Aloru*, 16 Bom. 722 (728).

If the judgment-debtor was out of possession at the date of sale, but subsequently recovered possession from the trespasser, a suit by the auction-purchaser against the judgment-debtor for possession is governed by Art. 144 and is not barred if brought within twelve years from the date of such recovery of possession by the judgment-debtor, though more than 12 years after the judgment-debtor had been dispossessed—*Ram Lakhan v. Gajadhar*, 33 All 224 (228); *Gajadhar v. Ram Lakhan*, 5 I C. 273.

Article 137 does not apply to a suit for possession by a purchaser at a sale held in execution of a mortgage-decree. "Under Article 137, the sale contemplated must be taken to be the sale of the interest possessed by the judgment-debtor referred to in that Article. Does the purchaser at a sale held in execution of a mortgage decree obtain merely the interest of the judgment-debtor? The answer is obviously 'no'. The interest which the purchaser acquires is certainly more than merely the interest of the judgment-debtor. We would therefore hold that Article 137 does not apply to purchasers held in execution of mortgage-decrees—*Sundaram v. Thiagaraja*, A I R 1923 Mad 160, 50 M L J 183.

577. Cases:—A sale-deed was executed on the 25th of September 1867 by A in favour of B, but B never entered into possession. On the 14th November 1874, the land was sold in execution of a decree against B. The auction-purchaser brought a suit on the 26th September 1879 for recovery of the land against the original vendor (A). It was held that the suit was barred by limitation under Art 137, as more than 12 years had elapsed from the time when B became entitled to possession (25th Sept. 1867)—*Anand Coomari v. Ali Jamin*, 11 Cal 229 (231).

Where at a partition between the members of a joint Hindu family consisting of father and three sons, the land in dispute was allotted to the

father and mother for their life and after their death the land was to be divided among the sons equally, the sons got a vested interest and not a contingent interest in the land. So, if a son mortgaged his interest in that land during the life-time of the parents, the right of the auction-purchaser at a sale held under the mortgage-decree to sue for possession accrued under this Article on the date of death of the parents, that being the date on which the son was entitled to possession—*Raghunath v Madhav*, 25 Bom. L R 456, A I.R. 1923 Bom. 415, 76 I.C. 217.

Three undivided brothers (B, R and A) mortgaged their joint property in 1870. In 1875 B's share was sold in execution of a decree against him and was purchased by the plaintiff. In 1877 B and his two brothers sold their property to defendants who at once paid off the mortgage and took possession. In 1890, the plaintiff sued for possession of B's share; it was held that the suit was barred by this Article, because B became entitled to possession of his share in 1877 when the mortgage was paid off by the defendants, and their possession had been since then adverse to the plaintiff—*Ganesh v. Ramchandra*, 20 Bom 557 (561).

Where A has obtained a decree against B, and at a sale in execution of that decree has purchased the property himself but has obtained symbolical possession, and then C obtains a decree against A and purchases the property at the sale held in execution of his decree, a suit brought by C to recover the property falls under this Article, because his judgment-debtor (A) who has obtained only symbolical possession is said to be 'out of possession' within the meaning of this Article, the actual possession being with B; and the period of limitation runs when A is entitled to possession, i.e., when A has obtained symbolical possession—*Ram Sumnun v Genda Lal*, 22 C L J. 574, 29 I C. 841 (842).

138.—Like suit by a Twelve The date when the sale
 purchaser at a sale years becomes absolute.
 in execution of a
 decree, when the
 judgment-debtor
 was in possession at
 the date of the sale.

Change—The words "the date of the sale" in the Act of 1877 have been changed into "the date when the sale becomes absolute."

578. Scope:—If the judgment-debtor is in possession of the property, the purchaser at Court-sale may either make an application under O 21, rr. 95, 96 for delivery of possession, or he may at his option bring a regular suit for possession. The two remedies are concurrent—*Kishori v. Chunder*, 14 Cal 644. Such a suit falls under this Article, whereas the application is governed by Art. 180. Moreover, the fact that an application has been made and is rejected as being time-barred or on other ground is no bar to a regular suit for possession under

this Article—*Sheo Narain v. Nur Muhammad*, 29 All 463; *Seru v. Bhagoban*, 9 Cal 602.

This Article only applies to suits in which the auction-purchaser is the plaintiff, and the *judgment-debtor* or some one claiming through him is the defendant. It does not apply to a suit brought by one auction-purchaser against another *auction-purchaser* of the same property—*Bhagwant v. Bholi*, 35 All 432, 18 I C 465 (reversing *Bholi v. Bhagwant*, 10 A.L.J. 13, 15 I.C. 10).

This Article applies to suits brought against a judgment-debtor or against any person claiming *through him* and remaining in possession after purchase made by the auction-purchaser. It does not apply where the defendant bases his claim to title and possession as a trespasser, relying upon possession *adverse* to the judgment-debtor. Art. 142 or 144 applies to such a case—*Bhikhad Bhunjan v. Upendra*, 4 P.L.J. 463 (471); *Janoki Nath v. Baikuntha*, 27 C.W.N. 259, 36 C.L.J. 140, A.I.R. 1922 Cal. 176, 70 I.C. 602. Similarly this Article does not apply where the defendant is a co-tenant of the judgment-debtor, because such co-tenant does not claim through the judgment-debtor—*Biswanath v. Rabiya*, 56 Cal. 616, 33 C.W.N. 46 (47), 117 I.C. 593, A.I.R. 1929 Cal. 250.

This Article applies not merely to a suit brought by the auction-purchaser, but also to a suit brought by a person claiming through such auction-purchaser, *e.g.*, a purchaser from the auction-purchaser—*Sati Prasad v. Jogesh*, 31 Cal 681 (684) F.B. (overruling *Mohima v. Nobin*, 23 Cal. 49); *Arumuga v. Chockalingam*, 15 Mad 331; *Pullayya v. Ramayya*, 18 Mad. 144; *Govind v. Gangaji*, 23 Bom. 246.

'In possession'—A property while under attachment in 1891 was usufructually mortgaged to the defendant for a period of 5 years. The property was sold in July 1891, and purchased by the plaintiff, who brought a suit in 1918 for redemption. *Held* that the suit was one for possession and not for redemption. The mortgage being void under sec. 64 C P Code, the plaintiff purchased the property free from the mortgage and not subject to the mortgage; *i.e.*, he purchased the property itself and not merely the equity of redemption. Article 148 therefore did not apply. The suit was really one under Article 138, because the mortgage being void, the judgment-debtor must be deemed to have been in possession at the date of the sale, and the plaintiff ought to have brought this suit within 12 years from the date of confirmation of the sale. Even if for argument's sake, the judgment-debtor is deemed to have been out of possession at the date of sale, and Article 137 is applied, the suit is barred, because it should have been brought within 12 years from 1896, *i.e.*, the expiry of the term of the mortgage, when the judgment-debtor was entitled to possession—*Srinivasa v. Vellayan*, 51 M.L.J. 143, A.I.R. 1926 Mad. 966, 97 I.C. 718.

579. Limitation.—Under the Act of 1877, the period of limitation ran from the "date of sale" which meant the date of actual sale, and not the date of its confirmation—*Kishori v. Chunder Nath*, 14 Cal. 644; *Venkatalingam v. Veerasami*, 17 Mad. 89; *Govinda v. Gangaji*, 23 Bom.

246; *Ahamed Kutti v. Rahman*, 25 Mad. 99. These cases are no longer good law as under the present Act time runs from the date of confirmation of the sale.

If the sale took place while the Act of 1877 was in force, but the suit for possession was instituted after the Act of 1908 came into operation, the suit would be governed by the new Act, and time would run from the date of confirmation of the sale and not from the date when the sale actually took place—*Biswessar v. Imamuddi*, 29 I.C. 833 (Cal).

If the defendant is a person claiming through the judgment-debtor, he can tack the period of his own possession to the period during which the judgment-debtor had been in possession after the execution sale; and if the whole period exceeds 17 years, the plaintiff's suit will be barred—*Namdev v. Rama Chandra*, 18 Bom. 37 (40).

580. Effect of symbolical possession :—This Article refers to cases where no possession either actual or symbolical, has been obtained through the Court. In fact, it refers to cases where the auction-purchaser, instead of having recourse to the summary method provided by O. 21, rr. 95 and 96 of obtaining possession through Court, chooses to bring a regular suit for possession. If, however, the auction-purchaser obtains symbolical possession, but is disturbed by the judgment-debtor or his representatives, a subsequent suit for possession does not fall under Art. 138, but is governed by Art. 144. And as regards the time from which the period of limitation is to run in such suits, it has been held that symbolical possession given by the Court to an auction-purchaser is equivalent to actual possession as against the judgment-debtor, and gives to the purchaser a new starting point of limitation—*Jagabandhu v. Ram Chunder*, 5 Cal. 584 (588) (F.B.); *Hari Mohan v. Baburail*, 24 Cal. 715; *Radha Krishna v. Ram Bahadur*, 16 A.L.J. 33, 22 C.W.N. 330 (P.C.); *Janaki Nath v. Baikuntha*, 27 C.W.N. 259, A.I.R. 1922 Cal 176, 36 C.L.J. 140; *Mangli Prasad v. Debi Din*, 19 All. 499 (501); *Rajendra v. Bhagwan*, 39 All. 460 (462); *Narain v. Latta*, 21 All. 269 (271); *Umbica Charan v. Madhub*, 4 Cal. 870 (876); *Joggobundhu v. Purnanand*, 16 Cal. 630. Hence, if after the date on which symbolical possession was given to the auction-purchaser, the judgment-debtor continued in possession, his possession became that of a trespasser from that date and gave the execution-purchaser a *fresh cause of action*, a suit upon which was governed by Art. 144 and the period should be reckoned from the date of delivery of the symbolical possession. This subject has been fully discussed in Note 621B under Article 144.

581. Section 47, C. P. Code —If the decreeholder is himself the auction-purchaser of the property in execution of his decree, the question arises whether his claim for possession of the property purchased must be determined by the Court in the execution department under the provisions of sec. 47 C. P. Code, or whether a separate suit is maintainable. It has been held by the Patna High Court that the question relating to the delivery of possession does not relate to the execution, discharge or satisfaction of the decree and does not come under

section 47 of the C. P. Code; and hence the proper proceeding relating to the delivery of possession is not by way of an application under O. 21, R. 95, for which the period of limitation is prescribed by Article 180, but by way of a regular suit, which is governed by Article 138—*Sridhar v. Jageshwar*, 4 P.L.J. 716 (730, 733), 47 I.C. 844. The same view is taken by the Bombay High Court—*Hargovind v. Budar*, 48 Bom. 550 (556, 559) (F.B.), 83 I.C. 932, A.I.R. 1924 Bom. 429 (overruling *Sadashiv v. Narayan*, 35 Bom. 452). The Allahabad High Court holds that the decreeholder purchaser may proceed either by an application or by a suit—*Bhagwati v. Banwari*, 31 All. 82 (F.B.). See also *Sheo Narain v. Nur Muhammad*, 29 All. 463, where the decreeholder was himself the purchaser and was allowed to bring a suit for possession after the application was barred. The Punjab Chief Court also follows the view of the Allahabad Full Bench, viz., that the remedy by application is concurrent with the remedy by suit—*Chotha Ram v. Karman*, 8 P.R. 1918, 44 I.C. 169.

But the Madras and Calcutta High Courts are of opinion that proceedings for delivery of possession to the auction-purchaser are proceedings in execution of the decree and fall within the scope of sec. 47 C. P. Code, and that a decreeholder who becomes the auction-purchaser cannot file a separate suit as contemplated by Article 138 but must proceed in execution in accordance with sec. 47; that Article 138 cannot override the provisions of sec. 47 C. P. Code—*Kailash v. Gopal*, 30 C.W.N. 649 (F.B.), A.I.R. 1926 Cal 798, 95 I.C. 494, *Kattayat v. Raman*, 26 Mad. 740; *Sandhu Taraganar v. Hussain*, 28 Mad. 87, *Kannam v. Avvulla Haji*, 50 Mad. 403, 99 I.C. 677, A.I.R. 1927 Mad. 288, *Madhusudan v. Gobinda*, 27 Cal. 34, *Ramnarain v. Bandi*, 31 Cal. 737.

139.—By a landlord to Twelve When the tenancy is recover possession years. determined.
from a tenant.

582. Scope.—This Article applies where the suit is brought for possession and where the tenancy has been determined. Where the plaintiff brought a suit not for possession by ejectment of the tenants, but for a declaration that the village in suit did not constitute the permanent *thika* right of the defendants as erroneously entered in the record of rights, and that it was in the possession of the defendants in temporary *thika* to be resumed year after year and after service of due notice, held that Art. 139 did not apply, because it was not a suit for possession and also because the tenancy had not determined but was still continuing—*Tekait Haranarayan v. Darshan Deo*, 3 Pat. 403 (407), 6 P.L.T. 315, A.I.R. 1924 Pat. 560, 83 I.C. 741.

This Article applies where there was a relationship of landlord and tenant between the parties. But it cannot apply where the defendants were not and never had been the tenants of the plaintiff, and had never paid rent—*Gopika Raman v. Atal Singh*, 56 Cal. 1003 (P.C.), 33 C.W.N. 463 (464), 144 I.C. 561, A.I.R. 1929 P.C. 99.

This Article which provides for a suit by a landlord to recover possession from a tenant, and gives 12 years from the determination of the tenancy, refers to suits in respect of tenancies in which the leases have expired, and so have terminated, or in respect of tenancies at will terminable by due notice. It does not refer to a suit by which the plaintiff seeks to recover from the holder of a title permanent in its tenure, as for instance where the defendants are in possession of the property by virtue of a permanent character not determinable by notice from the plaintiff—*Madho Koory v. Tekait Ram Chunder*, 9 Cal. 411 (417). A suit to recover possession from the defendants who claim to hold as permanent mokuraidars is governed by Article 144, and not by Article 139—*Ram Rachhya v. Kamakhya Narain*, 4 Pat. 139, 6 P.L.T. 12, A.I.R. 1925 Pat. 216, 84 I.C. 586.

A suit to recover possession from the representatives of the original tenant after the determination of the tenancy (no fresh tenancy having been created between the landlord and the original tenant's representatives, either expressly or by assent of the landlord after the termination of the tenancy) is governed by this Article and not by Article 144, and is barred if brought more than 12 years after the tenancy expired—*Sudalaimutha v. Suppani*, 48 M.L.J. 185, A.I.R. 1925 Mad. 446, 86 I.C. 938; *Subbraveh Ramiah v. Gundula Ramannah*, 33 Mad. 260 (261), dissenting from *Vadapalli v. Dronamraju*, 31 Mad. 163.

585. Determination of tenancy:—(As to when a tenancy determines see sec 111 of the Transfer of Property Act). When the tenant holds the land for a fixed period under a lease, the tenancy determines at the expiration of that period. If, after the expiration of that period, the tenant holds over, without the assent of the landlord, or without payment of rent or without any fresh agreement of tenancy being entered into, such holding over (which in English law is called 'tenancy by sufferance') will not amount to a fresh tenancy. The period of limitation for a suit to recover possession from the tenant will run from the expiry of the period of the lease—*Kanthappa v. Seshappa*, 22 Bom. 893 (897); *Chandra v. Daji Bhau*, 24 Bom. 504 (508); *Harī Gir v. Kumar Kamakhya Narain*, 3 Pat 534 (540), A.I.R. 1924 Pat. 572, 78 I.C. 511 (dissenting from *Krishnaji v. Anthaji*, 18 Bom. 256), *Pusa Mal v. Makdam*, 31 All. 514 (518), *Itappa v. Manavikrama*, 21 Mad 153 (163); *Vadapalli v. Dronamraju*, 31 Mad 163 (167), (dissenting from *Adimulam v. Pir Ravutham*, 8 Mad. 424), *Seshamma v. Chickaya*, 25 Mad. 507 (511); *Khunni v. Madan Mohan*, 31 All 316 (321) *Madan Mohan v. Rameshwar*, 7 C.L.J. 615; *Umar Baksha v. Baldeo Singh* 97 P.R. 1915, 32 I.C. 35; *Debi Prasad v. Gujar*, 20 A.L.J. 696, A.I.R. 1922 All. 423, 68 I.C. 750; *Bisheshwar v. Kundan*, 44 All 583 (585), A.I.R. 1922 All. 318, 75 I.C. 454. Where a demise or agreement specifies the term or event upon which the tenancy is to end, on the expiry of that term or upon the happening of that event the tenancy is determined *ipso facto*—*Right v. Darby*, 1 T.R. 162; *Messenger v. Armstrong*, 1 T.R. 54; *Cobb v. Stokes*, 8 East 358 (361); *Wilson v. Abbott*, 9 B. & C. 88; *Doc v. Inglis*, 3 Taunt 54; *Doc v. Sejer*, 3 Camp. 8; *Shivrudrappa v. Balappa*, 23 Bom. 283

(286). If the tenants continue in possession thereafter for a period of more than 12 years, without any sort of agreement with the landlord, the landlord's right to recover the land will be barred by Article 139 of the Limitation Act, the possession of the tenant having become adverse on the expiration of the tenancy—*Purshottom v. Vishnu*, 29 Bom. L.R. 1332, 105 I.C. 839, A.I.R. 1927 Bom. 650. Where, however, the landlord does some act (e.g., takes rent) to indicate his assent to the continuance of the tenancy, that act will convert the tenancy by sufferance into a tenancy at will from year to year or month to month (sec. 116 Transfer of Property Act), and the period of limitation for a suit for recovery of possession from the tenant at will will run from the termination of such tenancy (and not from the termination of the original tenancy)—*Ramchandra v. Bhikambar*, 37 Cal. 674 (679); *Khunni v. Madan Mohan*, 31 All. 318 (321); *Tekait Harnarayan v. Darshan Deo*, 3 Pat. 403 (410), A.I.R. 1924 Pat. 560; *Kanthappa v. Sheshappa*, 22 Bom. 893 (898); *Ram Lochan v. Kamakhya*, 4 P.L.T. 123, 71 I.C. 570, A.I.R. 1923 Pat. 201.

A tenancy for a definite term does not determine by reason of the tenant's disavowal of the landlord's title, but it determines only when the landlord does some act (e.g., serves a notice to quit) by which he indicates his option of terminating the lease by reason of such disavowal—*Shrinivas v. Muthusami*, 24 Mad. 246 (251). And unless the landlord elects to do so, the tenancy remains unaffected, in spite of the tenant's denial of the landlord's right—*Ittappan v. Manavi-krama*, 21 Mad. 153 (160, 163). But in case of a *tenant-at-will* the denial of the landlord's title is an evidence of the cessation of the tenancy—*Ibid* (at p. 164).

A person who lawfully came into possession of land as tenant from year to year or for a term of years cannot, by setting up *during the continuance* of such relation any title adverse to that of the landlord, acquire by the operation of the law of limitation a title as owner or any other title inconsistent with that under which he was let into possession. In other words, so long as the tenancy continues, time does not run against the landlord in lessee's favour. The landlord's title can be extinguished only at the expiration of the period prescribed by Article 139, and under this Article the period will commence to run only when the tenancy is determined. If after the determination of the tenancy, the tenant remains in possession as trespasser, for the statutory period (12 years, Art. 144) he will by prescription acquire a right as owner or such limited estate as he might prescribe for—*Seshamma v. Chukkaya*, 25 Mad. 507 (511), *Ittappan v. Manavikrama*, 21 Mad. 153 (163). Thus, where the defendants had, after the expiration of a lease, held over as yearly tenants, and then after the determination of that tenancy, continued to hold possession, claiming that they were permanent tenants, for more than 12 years (Art. 144), held that the defendants had acquired by prescription a right to hold possession as permanent tenants—*Parameshwaram v. Krishnan*, 26 Mad. 535 (537).

A person holding a land for his life cannot, by merely giving a notice that he claims to be holding on a perpetual or hereditary tenure, make

his possession adverse so as to bar a suit for possession on the expiration of the life-tenancy—*Beni Pershad v. Dudh Nath*, 27 Cal. 156 (166) (P.C.).

By the customary law of Malabar, a tenant under a Kanom or kuikanom lease is entitled not to be ejected until the expiration of 12 years. But where no time is fixed for the duration of the lease (*i.e.*, where the lease is for an indefinite period) it does not under the customary law determine on the expiration of 12 years from its date; consequently, in such a case, a suit for possession brought 14 years after the expiration of 12 years from the date of the lease is not barred—*Kelappan v. Madhavi*, 25 Mad. 452 (453).

A lease for life expires on the death of the lessee: and therefore a suit for possession against the heirs of the original lessee is barred under this Article if brought more than 12 years after the death of the lessee, in the absence of a fresh tenancy being created between the parties—*Kamakhyia Narain v. Bechut Singh*, 6 P.L.T. 361, 88 I.C. 483, A.I.R. 1925 Pat. 499 (500). An *istimrari mokrari* grant conveys only a life-interest to the grantee, and not a transferable or heritable interest; such interest comes to an end on the death of the grantee, and if the assignees of the grantee continue in possession thereafter, claiming as permanent *mokrari-dars* and are willing to pay rent as such demanding receipts in their own names, but the landlord refuses to grant such receipts and is willing to grant receipts to them as *marfatdars*, and consequently no rent is paid, held that there is no relationship of landlord and tenant between the proprietor and the assignees of the grantee, and a suit for possession brought more than 12 years after the death of the grantee for life is barred—*Kumar Kamakhyia Narain v. Ram Raksha*, 7 Paf. 649 (P.C.), 9 P.L.T. 501, 32 C.W.N. 897 (902), 30 Bom. L.R. 1361, 55 M.L.J. 682, A.I.R. 1928 P.C. 146, 109 I.C. 663.

Mere non-payment of rent for 12 years before the institution of the landlord's suit for possession, does not amount to termination of the tenancy—*Prem Sukh v. Bhupia*, 2 All. 517 (F.B.); *Tota v. Sakotia*, 18 P.R. 1888.

A disobedience by the tenant known to the landlord and accompanied by payment of rent to a third party does not, at any rate as long as the term of his tenancy lasts, make the tenant's possession adverse; though in the case of a tenancy-at-will such conduct might afford evidence of the determination of the tenancy—*Ittappan v. Manavikrama*, 21 Mad. 153 (160); *Doe d Graves v. Wells*, 10 A. & E. 427 (434).

Plea of tenancy and limitation in the alternative:—In a suit for possession of land brought against a tenant who is really a trespasser, the defendant, merely by alleging tenancy in his written statement, does not preclude himself from setting up the defence of the law of limitation—*Dino Monce v. Durga Pershad*, 21 W.R. 70 (74) F.B. When a suit is brought to recover possession, the defendant may plead that he is plaintiff's tenant, and at the same time may rely on the statute of limitation. If he fails to establish the former plea, it is still open to him to rely on

the second plea and in that event the suit will be treated not as a suit by a landlord against a tenant but as one to eject a trespasser (Art. 144) who has set up a pretended tenancy—*Maidin Saiba v. Nagappa*, 7 Bom. 96 (99); *Keamuddi v. Haro Mohan*, 7 C.W.N. 294.

Adverse possession by tenant:—See Note 613 under Art. 144.

584. Burden of proof:—It is not sufficient for the plaintiff merely to allege that the defendant is his tenant. The burden lies on the plaintiff to prove that the defendant is his tenant. If the plaintiff fails to prove the tenancy, the suit falls under Article 142, and the plaintiff must prove that he had been in possession within 12 years before suit. And if the plaintiff fails to prove this, his suit is barred—*Haji Khan v. Baldeo Das*, 24 All. 90 (93).

Where there is proof of the relation of landlord and tenant, it lies upon the defendant-tenant to shew that the tenancy was determined more than twelve years before suit—*Tiruchurna v. Sanguvien*, 3 Mad. 118; *Attar Singh v. Ram Ditta*, 110 P.R. 1881; *Adimulam v. Pir Ravutham*, 8 Mad. 424. If the defendant-tenant admits that the plaintiff's ownership continued up to a certain period, he must shew under Article 139 when the tenancy terminated, or he must shew under Article 144 when his adverse possession commenced, before he can set up adverse possession—*Tulsibai v. Ranchhod*, 26 Bom. 442 (444).

Once the relation of landlord and tenant is established, the cessation of the tenancy must be established by the tenant by means of affirmative proof over and above the mere non-payment of rent—*Prem Sukh v. Bhupia*, 2 All. 517 (F B).

**140.—By a remainder- Twelve When his estate falls
man, a reversioner years. into possession.
(other than a land-
lord) or a devisee,
for possession of
immoveable prop-
erty.**

585. Suit by reversioner, etc.—This Article, as well as Article 141, applies only when the plaintiff claims to succeed to the last holder of the estate, and cannot apply where he relies solely on his possessory title—*Harihar Prosad v. Kesho Prosad*, 5 P.L.T. Supp. 1, A.I.R. 1925 Pat 68 (93), 93 I.C. 454.

Where a grant of immoveable property is made to a person for life, the period of limitation for a suit by the grantor to recover possession of the property, the grantee being dead, will be twelve years from the death of the grantee—*Kuttyassan v. Mayan*, 14 Mad. 495 (498).

This Article applies to a suit by a reversioner other than a landlord. Article 139 deals expressly with the case of a landlord suing as such;

Article 140 deals with the case of a reversioner other than a landlord as such suing his tenant. Thus, a suit by a landlord to recover possession from persons who have dispossessed the tenants falls under this Article—*Krishna Gobind v. Hari Churn*, 9 Cal. 367 (370). See also *Ram Chandra v. Bhimakhambar*, 37 Cal. 674.

The words 'remainderman,' 'reversioner' and 'devisee' are used in this Article as technical terms of English law. Hence according to that interpretation the word 'reversioner' in this Article does not include a reversioner who succeeds on the death of a Hindu widow—*Bala v. Jati*, 155 P.R. 1883; *Roda v. Harnam*, 18 P.R. 1895 (F.B.) *Moro v. Balaji*, 19 Bom. 809 (814); *Maharaja Kesho Prasad v. Madho Prasad*, 3 Pat. 880 (897), A.I.R. 1924 Pat. 721, 83 I.C. 812. A remainderman claiming only an equity of redemption (the property having been 'mortgaged' by the life-interest-holder) comes within the meaning of a 'remainderman' under this Article—*Skinner v. Kunwar Naunihal*, 51 All. 367 (P.C.), 33 C.W.N. 761 (768), 27 A.L.J. 566, A.I.R. 1929 P.C. 158, 117 I.C. 22.

The plaintiffs brought a suit, as devisees under a will, to obtain possession of certain immoveable property; they asked also that an adoption and all other conditions of title relied on by the defendant might be set aside and their right to the property declared. Held that the suit fell under Article 140 and not under Article 118—*Fannyamma v. Manjaya*, 21 Bom. 159. Taking Article 118 with Articles 140 and 141, it appears that when a person claiming to be the next reversionary heir and being aware of an adoption having taken place seeks to obtain a bare declaratory relief in the life time of the widow who adopted the boy to her deceased husband, he is bound to bring his suit within six years from the time of his knowledge (Art. 118), but that will not prevent the reversioner from suing to obtain possession of the estate when it falls into possession (Art. 140) or when the widow dies (Art. 141), if the suit is commenced within 12 years from that time—*Lala Prabhu v. Mylne*, 14 Cal. 401 (417). In this case the word 'reversioner' in Art. 140 has been wrongly interpreted.

This Article does not apply unless the plaintiff is out of possession. Thus, a property was bequeathed to three persons in common, but after the testator's death only two remained in possession of the property, and the other devisee lived in a separate house of his own and the evidence of his participation in the property of the two houses was very slight. Held that although the third devisee did not participate in the property, still the entry of the other two must be held as entry on behalf of all (as they were joint tenants), unless there was clear evidence to hold adversely. Consequently, the third devisee was in possession through the other devisees, and his suit for possession does not fall under this Article, nor is it barred under any other Article—*Audipuram v. Appusundram*, 5 M.L.T. 103, 2 I.C. 311.

A Hindu testator (who was the Maharaja of a Raj estate) died in 1694 leaving a will appointing his widow as executrix, and giving her a life-estate in the properties and the remainder to any son that might be adopted

by the widow. The widow died in 1907, and an adoption made by her was declared to be invalid. The plaintiff (a successor to the Maharaja) brought a suit for recovery of possession of those properties. *Held* that Article 140 did not apply, as he was neither a remainderman, reversioner nor a devisee. A reversion arises where the grantor grants a particular estate to a person and does not dispose of the remainder. That which is not disposed of remains in the grantor and is called a reversion; it is the interest in land undisposed of which reverts to the grantor after the exhaustion of the particular estate. But here the complete estate was devised by the testator (the life estate to the Maharani, and the remainder to the son to be adopted), hence the plaintiff was not a reversioner. Nor was he a remainderman, for the remainder was devised to the son to be adopted by the widow. Nor was the plaintiff a devisee—*Maharaja Kesho Prasad v. Madho Prasad*, 3 Pat 880 (897), A.I.R. 1924 Pat 721, 5 P.L.T. 513, 83 I.C. 812.

It has now been settled by authorities (see Note 589 under Article 141 *post*) that 12 years' adverse possession against a life-tenant does not bar the right of the reversioners, whose right accrues only when the estate falls into possession. But where possession had begun to be adverse before the life-tenant entered into possession, Article 140 will not apply, and the continuous running of time will not be prevented by the interposition of the life-tenant. The adverse possession would be not only prejudicial to the life-tenant but also to the remainderman or reversioner. Thus, where after the death of the testator but before the administration was completed, a stranger entered into possession of the property, the beneficiary (who in this case is a life-tenant, the widow of the testator) will be barred if the executor fails to sue within the period prescribed by law, for the estate is still the estate of the testator and not the estate of the beneficiary (life-tenant) and consequently a title that may be acquired by a stranger by lapse of time will be a title acquired against the testator and not against the life-tenant. Both Arts. 140 and 141 *presuppose an estate* in a life-tenant or in a Hindu or Muhammadan female, but where in respect of any particular property the title of the testator is itself extinguished under sec 28 by reason of the executor failing to sue within the period prescribed by law, that particular property will not descend to the life-tenant or to the Hindu or Muhammadan female and consequently the case will not attract the operation of Article 140 or 141—*Maharaja Kesho Prasad v. Madho Prasad (Dumraon case)*, 3 Pat 880 (906), A.I.R. 1924 Pat 721, 5 P.L.T. 513, 83 I.C. 812.

586. Suit by adopted son—The childless widow of a Hindu, being in possession of his property as his heir, sold it to the defendant in 1868. Afterwards in 1888 she adopted a son who in 1890 brought the present suit to recover the alienated property. It was held that the suit did not fall under this Article, because the adopted son as such suing for present possession of his father's estate was not a remainderman, reversioner or devisee within the meaning of this Article. The suit fell under Article 144—*Moro v. Balaji*, 19 Bom 809 (819); *Sreeramulu v. Krishtamma*, 26 Mad. 143 (147); *Sita Ram v. Rajaram*, 48 I.C. 230 (Nag).

587. When the estate falls into possession :—The property left by a will falls into possession, under the Hindu Law, immediately upon the death of the testator; and therefore a suit claiming title to shares in immoveable property under a will is barred, unless brought within 12 years from the date of the testator's death under this Article—*Mylapore Iyasawmy v. Yeokay*, 14 Cal. 801 (808) (P.C.). The mere fact that there is a provision in the will to the effect that the property devised should be in the possession of a manager until the devisee should attain the age of 30 years, will not prevent the estate from falling into possession immediately on the date of the testator's death—*Krishna v. Panchuram*, 17 Cal. 272 (276).

Since the cause of action accrues to remainderman or reversioner only when the estate falls into possession, an adverse possession for any length of time against a tenant for life is ineffectual against the remainderman or reversioner whose right to possession only accrues on the death of the tenant for life—*Naunihal v. Skinner*, 47 All. 803, A I.R. 1925 All. 707, 92 I.C. 63; *Skinner v. Naunihal*, 51 All. 367 (P.C.), 33 C.W.N. 761 (768), 27 A.L.J. 566, A I.R. 1929 P.C. 158, 117 I.C. 22. Cf. the cases cited in Note 589 under Article 141.

141.—Like suit by a Twelve When the female dies. Hindu or Muham- years.
madan entitled to the possession of immoveable property on the death of a Hindu or Muham-
madan female.

History of the Article :—In order to arrive at a correct notion of the scope of this Article, it is useful to refer to the history of the enactment of this Article. Under section 1, clause 12 of the Limitation Act XIV of 1859, the period of limitation applicable to suits for the recovery of immoveable property or any interest in immoveable property to which no other provision of the Act applied was 12 years from the time the cause of action arose. This clause had been interpreted by the Courts in a sense which bore hardly upon the rights of the reversionary heir under the Hindu law, for it had been held that adverse possession against a Hindu widow entitled to her deceased husband's estate was adverse possession also against the male heir who would be entitled to the property after her death (See Note 589 below). The consequence was that a reversionary heir who had no right to possession during the widow's lifetime might lose his property to a person who had asserted adverse possession against the widow for a period of 12 years. Then came Act IX of 1871, in which Article 142 provided as follows: "Like suit by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow—Twelve years—When the widow dies"

Thus, special provision was made for the reversionary heir under the Hindu Law, who was given 12 years from the death of the widow to bring his suit. The effect of this was that time counting for adverse possession could not begin to run against the reversioner until he became entitled to enter into possession (See Note 589 below). But it came to be recognised that the rule laid down in the Act of 1871 was imperfect, inasmuch as it referred only to the reversionary heir succeeding upon the death of a Hindu widow, whereas other Hindu females, *e.g.*, daughter, mother, also had only a limited estate in the property inherited from males. So, in the later Act, XV of 1877, the scope of this Article was enlarged, so as to give the same period to Hindus and Muhammadans entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female. The extension of the rule to Muhammadans was probably intended to meet certain cases in which by custom or for some other reason persons who had been Hindu and had become Muhammadans were still bound by their old personal law in spite of their change of religion. The same rule has been preserved in Article 141 of the present Limitation Act of 1908—*Ghisa v Gajraj*, 18 O.C. 289, 33 I.C. 371 (375).

588. Scope of Article—This Article applies only when the female (on whose death the plaintiff is entitled to possession) had been out of possession; if the female had been in possession of the property till her death, this Article would not apply—*Gobinda v. Upendra*, 47 Cal. 274 (277), 23 C.W.N. 977, 56 I.C. 141. Moreover, Article 141 should be construed so as to cover those cases in which the cause of action arises on the death of the female, and the only obstacle to the reversioner seeking possession is either an act of the female or her inaction, resulting in either case in the loss of possession and the need of a suit by the reversioner—*Sesha Naidu v. Periasami*, 44 Mad. 951 (957). This shows that the loss of possession must have taken place in the lifetime of the widow through her act or omission.

This fact was totally ignored in the case of *Gajadhar v. Parvati*, 33 All. 312. In this case, one A died leaving two widows B and C as heirs, then B died and the surviving widow C was in sole possession of the property. After the death of C the property was taken possession of by a person who had no right to it, and that person occupied the estate for more than 12 years. Afterwards a reversioner of A sued to recover possession. It was held that the suit was barred, for time ran under Article 141 from the date of the death of C. The conclusion was correct, but Article 141 was wrongly applied because C died while in possession of the property, the proper Article applicable to the case was Art. 144.

The next question is, whether the expression "like suit" means only a "suit for the possession of immoveable property" or whether it is to be read with Article 140 so as to mean a "suit for the possession of immoveable property by a remainderman or reversioner who is a Hindu or Mahomedan entitled to the possession on the death of a Hindu or Mahomedan female"? In other words, does this Article apply to all

property claimed on the death of a female whether her right to it was limited or unlimited, or is it restricted to suits brought by reversioners who claim on the death of a female who was entitled only to a limited estate?

The correct interpretation of this Article is that the expression 'like suit' means a suit by a remainderman or reversioner for possession of immoveable property; that is, a suit by those heirs of the original propositus who claim on the death of a female entitled only to a limited estate and who are constantly styled reversionary heirs and not unfrequently remaindermen. This Article applies to those cases where there is an estate of the nature of a fee-simple or some analogous estate, out of which there has been carved by operation of law or otherwise an estate to be held by a female for her life, and a remainderman or reversioner is entitled to the remainder or reversion on the death of that female. *Starling*, pp. 388, 389.

This Article does not apply to a suit by an *heir-at-law* of female (as in the case of a son succeeding to the absolute estate of his mother) for possession of immoveable property in that character; it only applies to a suit by a person who before the death of a female occupied the position of a remainderman or reversioner or a devisee and on the death of the female sues on the basis of such title as remainderman, reversioner or devisee—*Hashmat Begum v. Mazhar Hussain*, 10 All. 343 (346). This Article must be read with Article 140, and refers to suits brought by person claiming under an independent title on the death of a Hindu or Mahomedan female; it does not apply to the case of a person suing on the very same cause of action which accrued to a Hindu female, and who acquires his right to sue as *her heir*—*Azam Bhuyan v. Faizuddin*, 12 Cal. 594 (596), *Malkarjan v. Amrita*, 42 Bom. 714 (717); *Ghisa v. Gajraj*, 18 O.C. 289, 33 I.C. 371. The estate of the Hindu or Muhammadan female referred to in this Article must be a *limited estate*, and not an *absolute one*, and the person bringing the suit must claim as the heir of the last male owner on the determination of the limited estate, and not as heir of the female. Art. 141 does not apply where the female had been in possession of an absolute estate—*Zariunnissa v. Shafiquzzaman*, 26 O.C. 133, A I R 1923 Oudh 185, 75 I.C. 626; *Bisheshar v. Rameshar*, 21 O.C. 1, 4 O.L.J. 948, 44 I.C. 368; *Ghisa v. Gajraj*, 18 O.C. 289, 33 I.C. 371. This Article intends to provide a rule of limitation applicable to suits for the recovery of estates which were once estates in expectancy and which have become vested in the heir of the last male owner on the determination of the limited estate held by a Hindu or Muhammadan female—*Ghisa v. Gajraj*, (*supra*). Art. 141 is merely an extension of Art. 140 with special reference to persons succeeding to an estate *as reversioners* upon the cessation of the peculiar estate of a Hindu widow—*Jayawant v. Ram Chandra*, 40 Bom. 239 (245), 33 I.C. 484, 18 Bom. L.R. 14. In an Allahabad case it was held that a suit to set aside an alienation of the plaintiff's property made during his minority by his mother as guardian, brought after the mother's death, was governed by Article 141—*Bachchan v. Kamta*, 32

All. 392 (396). This view, it is submitted, is not correct, because the plaintiff was not a *reversionary* heir after the mother's death but had been the owner of the property during the life-time of his mother. He could not be said to be a person entitled to the possession of the property "on the death of the female."

Article 141 applies only to those cases in which the person who brings the suit is claiming under an independent title in the same way as remaindermen and reversioners claim in suits under Article 140; but Article 141 should not be so interpreted that the estate of the Hindu or Muhammadan female referred to in this Article must be an estate created in the same way as the particular estate upon which the estate in remainder or reversion contemplated by Article 140 leans, that is to say, by grant or devise, or that it must be an estate characterised by the same incidents which attach to such a particular estate. The analogy connoted by the expression 'like suit' cannot be pushed to this extreme—*Ghisa v Gajraj*, (supra)

Article 141 is restricted to suits by plaintiff whose title and right as the heir of the last full owner to sue for possession accrues upon the death of a female holding a woman's qualified estate. To claim the benefit of this Article, the plaintiff must prove, first, that there was a qualified estate in the Hindu female, and secondly, that he was entitled to possession after the death of the female as the heir of the last male holder; and further it must be shown that having regard to the existing law the plaintiff was entitled to the possession of the properties in dispute at the date of the suit—*Maharaja Kesho Prasad v Madho Prasad*, 3 Pat 880 (897, 898), A.L.R. 1924 Pat 721, 5 P.L.T. 513

This Article applies even though the reversioner comes in after successive female heirs, as for instance, where he comes after the widow and the mother of the last male holder, and the mother had been dispossessed—*Kokilmoney v Manick*, 11 Cal 791; *Bankay v Raghunath*, 51 All. 188 (F.B.); or where he comes after the widow and daughter, and an alienation was made by the widow—*Sham Lal v Amarendra*, 23 Cal 460 (470), *Hanuman v Bhagauti*, 19 All 357.

This Article applies only where the reversioner is entitled to the possession of the property immediately on the female's death. Therefore where the property was in the possession of an usufructuary mortgagee from the widow at the time of her death, and then the defendant, a trespasser, obtained it on redemption, and the reversioner brought a suit for possession within 12 years of the date of redemption though more than twelve years after the date of death of the widow, held that the suit fell under Article 144 and was not barred. Article 141 did not apply as the reversioner was not entitled to possession immediately on the widow's death, but was entitled only after the satisfaction of the mortgage—*Ganga Sahai v. Kanhaiya Lal*, 11 A.L.J. 179, 18 I.C. 811 (813).

Article 141 is not to be applied indiscriminately to all suits by reversioners; if the suit falls under some other Article, Article 141

cannot apply merely because it is brought by a reversioner. This Article covers only those cases in which the cause of action is simply the death of the female, and the only obstacle to the reversioner seeking to obtain possession is either an act of the female or her inaction, resulting in either case in the loss of possession. It does not cover cases where the cause of action includes *something more*, beyond this, e.g. a transaction by the last male owner such as a mortgage (Art. 148), a mortgage by him and transfer by the mortgagee (Art. 134), a purchase in court auction (Art. 138), a lease (Art. 139) or a carving by him of life estates with a remainder or a revision following it (Art. 140), or any transaction involving the possibility of forfeiture (Art. 143) or loss of possession by him (Art. 142). In these cases, the specific Article (mentioned within brackets) applies. Thus, where a Hindu reversioner instituted a suit to recover possession of certain lands which had been usufructually mortgaged by the last male owner in 1866 and had been sold for consideration by the mortgagee in 1900 after the death of the last male owner and during the lifetime of his daughter who had inherited his estate and died in 1906, *held* that the suit fell under Article 134 and not Article 141, and was barred by limitation—*Sesha Naidu v. Periasami*, 44 Mad. 951 (957, 958).

This Article applies only to immoveable property, and not to moveables—*Vundravandas v. Cursondas*, 21 Bom. 646 (667).

A suit to recover *malikana* is not a suit for possession, and it is doubtful whether *malikana* is immoveable property. The proper Article applicable to the suit is Art. 120—*Gaggo v. Utsava*, 51 All. 439 (P.C.), 27 A.L.J. 716, 33 C.W.N. 809 (820), A.I.R. 1929 P.C. 166, 117 I.C. 498.

589. Adverse possession against widow, whether bars reversioners :—Before the Act of 1871, adverse possession against the widow not only barred the widow, but the reversioners also, because the Act of 1859 provided a period of twelve years from the 'accrual of cause of action,' and the reversioner's cause of action accrued from the same date as the widow's cause of action, viz. from the date of adverse possession—*Nobin Chunder v. Issur Chandra*, 9 W.R. 505 (F.B.); *Amrita v. Rajonee Kant*, 15 B.L.R. 10, 23 W.R. 214 (P.C.); *Babu v. Bhikaji*, 14 Bom. 317; *Drobomoyee v. Davis*, 14 Cal. 323 (344); *Sambasiva v. Ragava*, 13 Mad. 512 (515).

But the old law has undergone a change after the passing of the Act of 1871. The Acts of 1871, 1877 and 1908 have specially provided a separate cause of action for the reversioner, which accrues when the female dies and the estate falls into possession; the reversioner may therefore sue within twelve years from the death of the female, notwithstanding the fact that she had been out of possession for more than twelve years—*Gaggo Bai v. Utsava*, 51 All. 439 (P.C.), 56 I.A. 267, 27 A.L.J. 716, 33 C.W.N. 809 (821) A.I.R. 1929 P.C. 166, 56 M.L.J. 160, 31 Bom. L.R. 891, 117 I.C. 498, 10 P.L.T. 527; *Runchordas v. Parvatibai*, 23 Bom. 725 (P.C.); *Srinath v. Prosonno*, 9 Cal. 934

(937) (F.B.); *Kokilmoney v. Manick*, 11 Cal 791 (795); *Abinash v. Narhari*, 57 Cal. 289; *Dwarka Nath v. Komolmani*, 12 C.L.R. 548; *Abhoy Charan v. Attarmony*, 13 C.W.N. 931 (935); *Sham Lal v. Amarendra*, 23 Cal. 460; *Bankay v. Raghunath*, 26 A.L.J. 1049, A.I.R. 1928 All. 561, 112 I.C. 801; *Ram Kali v. Kedar*, 14 All. 156 (F.B.); *Amrit v. Bindesri*, 23 All. 448; *Jhamman v. Tiloki*, 25 All. 435 (439); *Vundravandas v. Cursondas*, 21 Bom. 646 (652, 670); *Moro v. Balaji*, 19 Bom. 809 (816); *Mukta v. Dava*, 18 Bom. 216 (220); *Hathi Singh v. Satilal*, 2 Bom. L.R. 106; *Shrinivasa v. Ramappa*, 18 M.L.T. 226, 30 I.C. 991; *Subbi v. Ramkrishnabhatta*, 42 Bom. 69 (77), *Baz Khan v. Sultan Malik*, 43 P.R. 1901; *Rulia v. Rulia*, 41 P.R. 1903; *Ganga v. Kanhaiya*, 41 All. 154 [Contra—*Saroda Soondari v. Doyamoyee*, 5 Cal. 938 (940)]. But this case must be deemed to have been overruled by the Full Bench case of 9 Cal. 934. See *Hari Nath v. Mathur*, 21 Cal. 8 (11) (P.C.)] *A fortiori*, if the adverse possession against the female was for less than the full statutory period, the reversioners would have 12 years from her death to sue for possession—*Venkata-ramayya v. Venkatalakashamma*, 20 Mad. 493; *Chiragha v. Mahtaba*, 79 P.R. 1898. The law allows the reversioner 12 years from the death of the widow, within which to bring his suit for possession, and it is not in the power either of the widow or of any person claiming through or against her to abbreviate that period or to substitute another period or starting point of time—*Cursondas v. Vundravandas*, 14 Bom. 482.

If however, the right of the female heir had been barred by twelve years' adverse possession before the Act of 1871 came into force, a reversioner suing after the Act of 1871 would also be barred, because a cause of action already barred under the Act of 1859 could not be revived by later Acts—*Braja v. Jiban*, 26 Cal. 285 (296), *Mohima v. Gouri*, 2 C.W.N. 162 (164); *Drobomoyee v. Davis*, 14 Cal. 323 (345); *Sham Lal v. Amarendra*, 23 Cal. 460 (471).

The question whether adverse possession against the widow for the statutory period bars the reversioners also, was unfortunately raised before the Privy Council in *Vaithialinga v. Srirangath*, 48 Mad. 883, A.I.R. 1925 P.C. 249, 30 C.W.N. 313, 92 I.C. 85, 49 M.L.J. 769, although it was not necessary for the decision of the suit (which was a case of adverse decree against widow) and their Lordships after reviewing the Privy Council decisions on the subject expressed the opinion that the adverse possession against the widow barred the reversioners also, and that the Board had invariably applied the rule of the *Sivaganga* Case (see Note 590 below) where that rule was applicable. This pronouncement was made by way of *obiter*, but it has been followed by the Calcutta High Court (Single Bench) in the recent case of *Aurobindo v. Monorama*, 55 Cal. 903, 32 C.W.N. 913 (919), A.I.R. 1928 Cal. 670. In this case it has been remarked (also by way of *obiter*) that there is no difference in principle between an adverse decree against a female and an adverse possession against a female, and since it is settled law that an adverse decree against a female binds the reversioners, an adverse possession against the female likewise bars the reversioners.

It should be noted that this observation was also unnecessary for the decision of this case, because it was a declaratory suit in respect of *moveable* property, to which Article 120 applied. In a very recent case the Division Bench of the same High Court has observed that *Vaithalinga's case* (48 Mad 883 P.C.) should be applied only where the adverse possession is the result of a *decree*, which is binding on the reversioner, and in such a case the reversioner is also barred; but that ruling should not be applied to a case of simple adverse possession which is not the result of any decree. "A case is an authority for what it actually decides and not for what would logically follow from such decision. *Vaithalinga's case* does not lend support to the proposition that adverse possession which barred the widow will also bar the reversionary heir under the present Limitation Act"—*Abinash v. Narhari*, 57 Cal 289, 50 C.L.J. 260, 123 I.C. 444, A.I.R. 1930 Cal. 165 (168).

It has been held in some cases that where property, the estate in which has descended to a female heir, *never reaches her hands* but is held adversely to her by a stranger, the cause of action for a suit for the recovery of the property accrues at the commencement of the adverse possession by the stranger, and a suit to enforce that cause of action will be barred both against the female heir and against the reversioner after the expiration of the statutory period of limitation counting from the commencement of adverse possession, the stranger having after the expiration of that period acquired an absolute indefeasible title to the property. Article 141 does not apply to the case—*Hanuman v. Bhagauti*, 19 All. 357 (371), *Gya Pershad v. Heet Narain*, 9 Cal. 93 (95); *Aurabindo v. Monorama*, 55 Cal. 903, 32 C.W.N. 913; *Ghandharap v. Lachman*, 10 All. 485 (488), *Tika Ram v. Shama Charan*, 20 All. 42 (46). But in another Allahabad case, where a separated Hindu died in 1862 leaving a widow and daughter but no son, and the estate descended to the widow but possession never reached her as a nephew of her husband (who had then no title to the property) took possession of the property immediately on the death of the last male holder, and retained possession for more than 12 years, and then after the death of the widow in 1887, the daughter (reversioner) sued for possession, it was held by a Full Bench that *Article 141 applied*, that the suit was not barred as the plaintiff had 12 years from the death of the widow in 1887 within which to sue, and that the adverse possession of the nephew had not become adverse to the daughter—*Ram Kali v. Kedar Nath*, 14 All. 156 (F.B.). This Full Bench decision was disapproved of in *Hanuman v. Bhagauti*, 19 All. 357 (373) and *Tika Ram v. Shama Charan*, 20 All. 42 (46), but has been followed in *Amrit v. Bindesri*, 23 All. 448 (453), and *Jhamman v. Tiloki*, 25 All. 435 (439), and in the recent Full Bench case of *Bankey v. Raghunandan*, 51 All. 188 (F.B.), 26 A.L.J. 1049, A.I.R. 1928 All. 561 (567), 112 I.C. 801. The Privy Council case of *Runchordas v. Parvatibai*, 23 Bom. 725 (P.C.) (on appeal from 21 Bom. 646) also lends support to the Allahabad Full Bench rulings. In this case, a Hindu died in 1860 leaving two widows the survivor of

whom died in 1888. He had made a will by which he left certain specific property to his widows for their lives, and bequeathed the residue of his property to trustees upon certain trusts. On his death his widows took possession of the property specially bequeathed to them, and the trustees took the residue and applied it in the manner directed in the will. On the death of the survivor of the two widows, the plaintiff, a nephew of the testator, sued to have the trusts of the residue declared void, and in effect for possession of the entire property of the testator. The Privy Council held that the trusts were void, and that the plaintiff's suit fell under Article 141 and was not barred. In this case it is quite clear that in respect of the residuary estate, the trusts being void, the widows were entitled to it, but they *never obtained possession* of that estate, and the trustees had remained in possession of it for more than 12 years adversely to the widows. But still that possession did not become adverse to the reversioner (plaintiff).

On the other hand the ruling in *Hanuman v. Bhagauti*, 19 All. 357 seems to find some support from the Privy Council decision of *Lachhan Kunwar v. Manorath*, 22 Cal. 445 (P.C.). The facts of this case are that on the death of one P, his widow L was entitled to succeed to the property, but she never obtained possession as the estate was taken possession of by P's mother J immediately upon P's death. J held possession absolutely for nearly 25 years up to her death. After J's death, L together with other persons who claimed as reversionary heirs of P instituted a suit for possession of the property. It was held that the adverse possession of J and of her transferees (she having made a gift of the property to the defendants) for more than 12 years extinguished the rights of L and the other plaintiffs (reversioners of P).

But when possession had begun to be adverse against the *last male owner* before the female came in, it would not cease to be so by reason of subsequent interposition of a female heir. Thus, a Hindu widow alienated some property, and afterwards adopted a son, who died some years after attaining majority, without setting aside the alienation, leaving a widow who succeeded him and who also died subsequently; a suit brought by the reversioners of the adopted son, for possession of the alienated property, within twelve years after the death of the adopted son's widow, was held to be barred, because the alienee had acquired a prescriptive title by adverse possession as against the adopted son, and Art 141 did not apply to this suit—*Amrita v. Jatindra*, 32 Cal. 165 (168). Article 141 applies where the last full owner was in possession at the time of his death. If he himself was dispossessed, time would begin to run against him and the operation of the law of limitation will not be arrested by the fact that on his death he was succeeded by a female heir, e.g., widow, daughter, or mother—*Mohendra v. Shamsunnessa*, 21 C.L.J. 157 (164), 27 I.C. 954, 19 C.W.N. 1260; *Pandurang v. Basappa*, 77 I.C. 479, A.I.R. 1923 Bom. 364; *Ramayya v. Kofamma*, 45 Mad. 370 (373), A.I.R. 1922 Mad. 59, 67 I.C. 246. See also *Maharaja Kesho Prasad v. Madho Prasad*, 3 Pat. 880 cited in Note 585 under Article 140.

590. Decree against female—Effect on reversioners :

—An adverse decree against the widow stands on a different footing from an adverse possession against the widow. An adverse possession for more than 12 years against the widow does not bar the reversioner's rights, but if a decree founded upon the law of limitation (*i.e.*, founded upon adverse possession) is obtained against the widow in her life-time, the reversionary heir is barred, and he does not get the benefit of Art. 141—*Gaggo v. Utsava*, 51 All. 439 (P.C.), 56 I.A. 267, 33 C.W.N. 809 (821), 27 A.L.J. 716, A.I.R. 1929 P.C. 166, 117 I.C. 498. An adverse decree in a suit brought by a Hindu widow for possession of a property as heir to her husband, if it had become final in her life-time, would bind those claiming the property in succession to her, and unless it could be shown that there had not been a fair trial of the right in that suit, or in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to the widow—*Katama Nachier v. Raja of Sivaganga*, 9 M.I.A. 539 (604), 2 W.R. P.C. 31. A decree passed adversely to the female heir in respect of a transaction in which she represents the estate binds the reversioners—*Jugal Kishore v. Jitendra*, 10 Cal 985 (P.C.); *Hari Nath v. Mathur*, 21 Cal 8 (P.C.), 20 I.A. 183; *Vaithialinga v. Srirangath*, 48 Mad. 883 (P.C.), 52 I.A. 322, 30 C.W.N. 313, A.I.R. 1925 P.C. 249. Thus, where a suit by a female heir to recover possession from a trespasser had been dismissed on the ground that it was barred by the defendant's adverse possession against her for 12 years, the decree so dismissing the suit was binding on the reversioner who brought a suit for possession after the death of the female. Article 141 did not apply, and would not give the reversioner 12 years' time to sue after the female's death, because the plaintiff being bound by the decree against the female, he was not 'entitled to possession of any property' within the meaning of this Article—*Harinath v. Mothur Mohan*, 21 Cal. 8 (18) (P.C.), following the *Sivaganga Case*, 9 M.I.A. 539 (603). If a Hindu dies leaving a widow and a daughter, and an alienation being made by the widow, the daughter brings a suit to set aside the alienation which is dismissed, the adverse decree would, in the absence of fraud or collusion, be binding on the reversioner coming after the daughter's death—*Hanuman v. Bhagauti*, 19 All. 357 (374).

But where a gift was made by the widow, and she brought a suit to set aside that gift on the ground that the conditions on which the gift had been made were not fulfilled by the donees, and that suit was dismissed, the decree in that suit was not binding on the reversioners, who could bring a suit to recover possession within 12 years after the widow's death, under Article 141. The widow in the enjoyment of a life estate can never fully represent the estate within the meaning of the *dicta* in the *Sivaganga case* in any litigation arising out of acts of her own, and the litigation by the widow in the enjoyment of a life-estate cannot represent the estate fully so as to give rise to a bar of *res judicata* against reversioners, if such litigation was qualified and

personal to the widow or had arisen out of acts of her own affecting the estate during her own life-estate therein—*Subbi v. Ramakrishnabhatta*, 42 Bom. 69 (77, 79).

591. Suits under this Article:—A suit by a reversioner to recover possession of property *improperly alienated* by a Hindu widow is governed by this Article. The suit is not barred if brought within 12 years from the death of the female, although the alienee might have been in possession for more than 12 years. The law in this respect is the same under the Acts of 1859, 1871, 1877 and 1908. See *Sambasiva v. Ragava*, 13 Mad. 512 (515); *Mukta v. Dada*, 18 Bom. 216; *Hanuman v. Bhagauti*, 19 All. 357; *Sham Lal v. Amarendra*, 23 Cal 460; *Roy Radha v. Nauratan*, 6 C.L.J. 490; *Chiragha v. Mahtaba*, 79 P.R. 1898; *Khair Khan v. Ghulam Ghous*, 32 P.R. 1911, 10 I.C. 387; *Khula Ram v. Gulab*, 33 P.R. 1911 (F.B.), 11 I.C. 392. It does not fall under Art. 91, because the cancellation of the instrument of alienation is not a condition precedent to the right of action of the reversionary heir—*Biroy Gopal v. Krishna Mohishi*, 34 Cal. 329 (P.C.) (reversing *Biroy Gopal v. Nitratan*, 30 Cal 990); *Harihar v. Dasarathi*, 33 Cal 257; *Rakhmabai v. Keshab*, 31 Bom. 1.

A suit by a reversioner for possession of property after the death of a female is governed by this Article and not by Article 118, even though the suit involves the question of the validity of an adoption made by the female. The other Article applies only to suits in which a bare declaration is sought for and does not apply to a suit for possession: and the fact that a person has not sued for a declaration under Article 118 should not be a bar to a suit for possession of property under this Article—*Basdeo v. Gopal*, 8 All. 644 (646); *Natthu v. Gulab*, 17 All. 167 (171); *Hari Lal v. Bai Rewa*, 21 Bom. 376 (379), *Baikanta v. Kali*, 9 C.W.N. 222 (224), *Md. Umar v. Md. Niazuddin*, 39 Cal. 418 (432) (P.C.), *Lala Parbhu v. Mylne*, 14 Cal. 401 (417); *Valaga v. Bandalmudi*, 30 Mad. 308 (310); *Rama Rao v. Venkoba*, 17 M.L.J. 282; *Bhagabat v. Murari*, 15 C.W.N. 524, 7 I.C. 427 (433). See Note 493 under Article 118.

A suit by a Hindu daughter for possession of her share in her father's estate on the death of her mother or stepmother falls under this Article, and time runs from the date of the mother or stepmother's death—*Tulsa v. Bhagwat*, 11 A.L.J. 333, 20 I.C. 179, *Ram Singh v. Bhani*, 38 All. 117 (121). This shows that the plaintiff in a suit under this Article need not be a male entitled to a full estate, but may be a female entitled to a limited estate succeeding on the death of a female who was similarly entitled to a limited estate.

Where a Muhammadan widow, who had been in possession of her husband's property in lieu of unsatisfied dower, sold away the property, a suit brought after the widow's death by the heirs of the husband for possession of the property is governed by this Article, and limitation runs from the date of the widow's death and not from the date of the

transfer—*Sheikh Abdur Rahman v. Sheikh Wali Mahomed*, 2 Pat. 75 (80), A.I.R. 1923 Pat. 72, 68 I.C. 601, 4 P.L.T. 267.

592. Suits not under this Article :—A suit by the adopted son to recover property alienated by his adoptive mother before adoption is governed by Art 144, and not by this Article, because he was not a person entitled to property 'on the death of a female' but entitled to the property immediately from the date of his adoption—*Moro v. Balaji*, 19 Bom 809 (814).

Where succession vests jointly in two female heirs (e.g. two daughters), who make no partition of the property, a suit by one on the death of the other to recover possession of the property cannot be said to be a suit under this Article, because the plaintiff does not succeed to the deceased's interest by inheritance as reversionary heir, but acquires the interest by survivorship. This Article contemplates inheritance, not survivorship—*Sachindra v. Rajani*, 18 C.W.N. 904 (906), 27 I.C. 250.

This Article does not apply where the plaintiff is not the nearest reversioner entitled to succeed to the property on the death of a female, but is a reversioner next in succession to the nearest reversioner. Thus, the last male owner died leaving a widow, and the widow improperly alienated a portion of the land, but the nearest reversioner did not bring a suit to challenge the alienation after the widow's death and then died; a suit was then brought by the reversioner, next in succession to the deceased reversioner, for possession of the land alienated. Held that the suit did not fall under this Article but under Article 144—*Sundar v. Sahib Ram*, 26 P.R. 1911, 9 I.C. 300.

593. Starting point of limitation :—The cause of action for a suit by the reversioners for possession of lands left by the last male owner and alienated by his widow accrues on the death of the widow, and not on the date of the alienation—*Chiragha v. Matibha*, 79 P.R. 1898; *Pursat Koer v. Palat Roy*, 8 Cal. 442 (445). See also 2 Pat. 75 in Note 591 *supra*.

The cause of action for the reversioner arises when the female dies. Where there are two widows of the last male holder and one of them dies, the estate passes to the surviving widow, and no cause of action accrues to the reversioners until the death of the surviving widow (even though the alienation was made by the other widow)—*Mustafali v. Baradaganis*, 43 Mad 835, 39 M.L.J. 567, A.I.R. 1921 Mad. 746, 60 I.C. 135; *Ram Dei v. Abu Jafar*, 27 All. 494 (498); *Mukta v. Dala*, 18 Bom. 216 (220); *Cursondas v. Vandarandas*, 14 Bom. 492.

Similarly, where there are several daughters inheriting the father's estate, on the death of one of them the survivors get the whole estate and no cause of action will accrue to the reversioners until all the daughters are dead.

If the reversioner comes in after successive female heirs (e.g. after the widow and daughter, or after the widow and mother) his suit is

In time if brought within 12 years of the date of the death of the last female holder, even though the alienation was made by the previous female holder. See *Kokilmoney v. Manick*, 11 Cal. 79; *Sham Lal v. Amarendra*, 23 Cal. 460; *Sambasiva v. Ragava*, 13 Mad 512 (515); *Hanuman v. Bhagauti*, 19 All 357. Under this Article, a suit may be brought within 12 years of the date of the death of the last female entitled to succession—*Pursut Koer v. Palat Roy*, 8 Cal. 442 (445).

If the reversioner does not bring any suit and then dies, and his representative brings a suit after the expiry of 12 years from the death of the female, the suit is barred; and the plaintiff cannot claim any extension on the ground of his minority, because when time has once begun to run against the reversioner, it cannot be stopped by the minority of the plaintiff (sec. 9)—*Rup Kishore v. Patrani*, 50 All. 152, 107 I.C. 45, A.I.R. 1927 All 818 (820). A widow alienated her husband's property in 1894 and in that year a suit was brought by the plaintiff's father to set aside the alienation but it was dismissed on the ground that he was not the nearest presumptive reversioner, but one B. After the widow's death in 1879, B brought a suit in 1909 to recover possession of the property, but the suit was dismissed in 1916 on the ground that he was not a reversioner at all as his alleged adoption was invalid. The plaintiff then filed a suit in 1919 for possession of the property as reversioner. Held that the suit having been filed more than 12 years after the widow's death was barred under this Article; and the plaintiff had got no fresh cause of action in 1916 when it was found that B was not a reversioner at all. Once limitation had begun to run, it could not be suspended. It can not be said that the plaintiff could not bring a suit until the judgment of 1916 was delivered—*Ranga Nath v. Rama Pandithar*, 44 M.L.J. 87, A.I.R. 1923 Mad 108, 70 I.C. 446.

Where a Hindu widow remarried in 1899 and transferred her first husband's property in 1913, and a suit was brought in 1913 by the reversioners of her first husband to recover the property, held that the suit fell under Article 143 or 141, if Article 141 applied, the cause of action for the plaintiff accrued not on the date of alienation, but on the remarriage in 1899, as the widow incurred civil death, so far as her first husband was concerned, by her remarriage, and her subsequent possession was that of another person in the eye of law. The suit was therefore barred—*Nathu v. Nai Bahu*, 11 N.L.R. 86, 29 I.C. 612.

If an alienation was made by the widow of the last male holder in 1857 and the plaintiff (who is the daughter's son of the last male holder) succeeded to the property in 1890, after the death of the last surviving daughter of the last male holder, the suit is governed by the Act of 1877, and not by the Act of 1859, because the starting point of limitation is the death of the female (1890) which took place while the Act of 1877 was in force, and not the date of alienation (1857). See *Hanuman v. Bhagauti*, 19 All 357 (365); *Sambasiva v. Ragava*, 13 Mad. 512.

Effect of bar of limitation.—If the nearest reversioner entitled to sue under this Article does not bring a suit within 12 years of the death of the female, for possession of the property alienated by the female, and then dies, the reversioner next in succession to the deceased reversioner is not thereby barred, but is entitled to bring a suit within 12 years from the death of the deceased reversioner. The possession of the defendant which was adverse to the deceased reversioner does not become adverse to the present reversioner until he succeeds to the property—*Sundar v. Salig Ram*, 26 P.R. 1911 (F.B.), 9 I.C. 300; *Malkarjun v. Amrita*, 42 Bom. 714 (718).

If there are two reversioners, and a suit is brought by one reversioner within 12 years of the death of the female, to recover possession of his share by partition, and the other reversioner is made a defendant in that suit, and the latter in his written statement claims possession of his share, such a claim would not be barred by limitation by reason of the fact that his written statement has been filed after the lapse of 12 years from the death of the female. Although it is true that a separate suit filed by the defendant at the time he filed his written statement would have been barred by limitation, and his right would have been extinguished by operation of sec. 28, still it does not follow that his right would be extinguished if he were a party to a suit instituted by another within the prescribed period in which his right to the property could be effectually determined—*Rayegavda v. Ramlingappa*, 53 Bom. 472, 31 Bom. L.R. 647, 119 I.C. 656, A.I.R. 1929 Bom. 345 (347), following *Narsingh v. Vaman*, 34 Bom. 91 (99).

594. Presumption of death of female.—The plaintiff sued in 1911 as a reversioner to recover possession of property alienated by a Hindu widow, who had disappeared in 1865 and was not heard of since 1870. The lower Courts held that under sec. 108 of the Evidence Act it would be presumed that the widow died at the time of the suit and that therefore the suit was within time. But the High Court held that it lay on the plaintiff to prove affirmatively that he had brought his suit within 12 years from the actual death of the widow and that no presumption would be drawn according to the terms of sec. 108, Evidence Act—*Jayawant v. Ram Chandra*, 40 Bom. 239 (247), 33 I.C. 484. When the question is not merely of death but of death at a particular time, there is no presumption as to the time, but the party concerned to make out the death on a specified date must prove it by evidence—*Parsoo v. Munnalai*, 13 N.L.R. 16, 39 I.C. 21. See also *Venkata Ramakrishna v. Sriramulu*, 46 M.L.J. 541 (P.C.), A.I.R. 1924 P.C. 136, 26 Bom. L.R. 563, where the entry in a *puruhit's* book as to the date of death of the widow was held to be unreliable.

But where it is known that a widow died in May 1902, but the exact date of the month is unknown, and the plaintiff brought his suit on the 5th May 1914, held that the defendants were bound to prove that she died before the 5th of May 1902—*Tani v. Rikhi Ram*, 1 Lah. 554 (557), 56 I.C. 742.

142.—For possession of Twelve The date of the dispos-
 immoveable pro years. session or discontinu-
 perty when the ance.
 plaintiff, while in
 possession of the
 property, has been
 dispossessed or has
 discontinued the
 possession.

Application of Article :—The general rule of limitation in suits for recovery of property in cases where the plaintiff while in possession has been dispossessed or has discontinued possession, is twelve years, and if the defendants rely upon a shorter period of limitation under any special law, the burden lies upon them to establish the circumstances requisite to make the shorter term applicable. Thus, where the tenants have been dispossessed by their landlord and bring a suit to recover the land within 12 years from the date of dispossession, but the defendant (landlord) contends that the land being an occupancy holding, the special period of two years' limitation prescribed by Art. 3, Sch III of the Bengal Tenancy Act applies, *held* that it lies upon the defendant to establish the occupancy character of the holding so as to bring the suit within the scope of the special rule of limitation—*Tara Nath v. Iswar Chandra*, 16 C.W.N. 398 (402), 14 C.L.J. 598, 11 I C. 164.

595. "While in possession" :—When a plaintiff's title is once established, however obtained (i.e., whether it is taken forcibly or not) would be possession within the meaning of this Article—*Protab Chandra v. Durga Charan*, 9 C.W.N. 1061 (1064). Thus where the rightful owner of lands was dispossessed but succeeded in ousting the trespasser without recourse to law, and continued in possession, such possession would be the possession of the owner within the meaning of this Article; and if the rightful owner is again afterwards dispossessed under a decree obtained by the trespasser under section 9 of the Specific Relief Act, the period of limitation for a suit by the rightful owner to recover possession would run from the date of the dispossession under the decree, and not from the date of the original dispossession. The interval between the time when the owner ousted the defendant and the time when the defendant recovered possession of the land under sec. 9 of the Specific Relief Act should enure to the benefit of the owner and not of the trespasser—*Jonab v. Surya Kant*, 33 Cal. 821 (825); *Protab Chandra v. Durga Charan*, 9 C.W.N. 1061 (1064); *Mumtazuddin v. Barkatula*, 2 C.L.J. 1; *Waziruddin v. Deoki*, 6 C.L.J. 472. In other words, if there is a re-entry by the true owner, such re-entry puts an end to the previous adverse possession of the trespasser.

Possession is either actual or constructive. Where one co-sharer holds the share of another co-sharer who being absent had simply ceased

to hold actual possession, the holder's possession implies constructive possession by the real proprietor. While either kind of possession exists in the proprietor, time does not begin to run against him—*Shahzada Suraya v. Azim*, 29 P.R. 1910, 5 I.C. 888. As to the effect of symbolical possession, see Note 621B under Art. 144.

596. Dispossession—Dispossession implies the coming in of a person and driving out of another person from possession—*Rains v. Buxton*, (1880) 14 Ch. D. 537 (539), *Brojendra v. Sarojini*, 20 C.W.N. 481, 22 C.L.J. 283, 31 I.C. 242; *Panchoo v. Janeswar*, 32 C.L.J. 9, 58 I.C. 844, *Charu Chandra v. Nahush Chandra*, 50 Cal. 49 (63), A.I.R. 1923 Cal. 1, 74 I.C. 630. Dispossession implies ouster, and the essence of ouster is that the person ousting is in actual occupation of the land. The mere finding that the plaintiffs are not in possession of the disputed lands does not decide the question whether there was dispossession. The statute applies not to want of actual possession by the plaintiff but to cases where he has been out of, and another is in, possession of the lands for the prescribed time—*Smith v. Lloyd*, 23 L.J. Exch. 194; *Sheikh Bahadur Ali v. Secretary of State*, 2 P.L.T. 133, A.I.R. 1921 Pat. 277, 61 I.C. 78. Where the plaintiff is merely resisted by the defendants in his attempt to possess separately his share in the property, but the defendants do not drive out the plaintiff from his possession, there is no dispossession—*Gaya Prasad v. Bakya Mani*, 56 Cal. 914, 33 C.W.N. 277 (278), 119 I.C. 289, A.I.R. 1929 Cal. 297.

If a proprietor who has been collecting rent from tenants is prevented from doing so because a rival proprietor has successfully invoked the aid of a Court of Justice, the injured proprietor is 'dispossessed' from his property just as if he had been driven out by physical force—*Asiatulla v. Sadatulla*, 26 I.C. 368, *Lala Sahu v. Ghunaria*, 2 I.C. 381.

Dispossession under a decree of the Court obtained under section 9 of the Specific Relief Act is dispossession within the meaning of this Article; limitation runs against the true owner from the date of such dispossession—*Protap Chandra v. Durga Charan*, 9 C.W.N. 1061; *Mamta-uddin v. Barkatulla*, 2 C.L.J. 1, *Jonab v. Surja Kanta*, 33 Cal. 821.

Where upon the occasion of a regular settlement the plaintiffs, who were the proprietors of a land on which the rent-free tenure had been resumed some years before, declined to engage for the payment of the land revenue, in consequence of which the Government made the engagement with the defendants, who were put in possession of the land, it was held that there was dispossession of the plaintiffs or discontinuance of possession by them within the meaning of this Article, and that time began to run from the date of the defendants being put into possession—*Muhammad Amanulla v. Badan Singh*, 17 Cal. 137 (142, 143) (P.C.), 16 I.A. 148, 23 P.R. 1890.

597. Encroachment by tenant:—When a tenant takes possession of lands of his landlord outside his tenancy and professes to do so in his character as a tenant, the landlord is dispossessed in a

limited sense; in other words, he is deprived of actual or *khas* possession of the land, but not of proprietary possession or possession by receipt of rent in such a case Art. 142 would apply, and the landlord, if he wishes to eject the tenant, must bring his suit within 12 years of the dispossession. If he does not do so, his title to recover actual possession would be barred, not his right to proprietary possession, *i.e.*, right to receive fair rent, would not be lost, because the possession of the tenant, so far as the latter right is concerned, has never been adverse—*Ishan v. Ramranjan* 2 C.L.J. 125. If the tenant encroaches upon the lands of his landlord, and claims that these lands are *within his tenure*, and thus holds possession of those lands for more than 12 years, the landlord's suit for ejectment is barred under Article 142, and the tenant by virtue of the statute of limitation acquires a right which entitles him to claim to hold the lands as a tenant of his landlord and to resist the landlord's claim for *khas* possession. But the landlord's proprietary right is not lost, because what has been asserted by the tenant is not that he has acquired by adverse possession an absolute interest, but only a tenancy right in the property—*Gopal Krishna v. Lakhiram*, 16 C.W.N. 634 (636), 14 I.C. 212 *Raktoo v. Sudhram*, S.C.L.J. 557. If however the tenant intends the encroachment for his own exclusive benefit, and sets up a title adverse to the entire interest of the landlord, the latter must bring a suit to eject the tenant as a trespasser; if he fails to do so, his right to the proprietary possession as well as to the actual possession would both be barred—*Ishan v. Ramranjan*, 2 C.L.J. 125; *Raktoo v. Sudhram* S.C.L.J. 557.

The nature and effect of the possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the tenant. Consequently, there can be no acquisition of an absolute title, where it is found that the tenant has asserted nothing but a limited interest. Adverse possession of a limited interest, though a good plea to a suit for ejectment, is good only to the extent of that interest, and not of the entire interest—*Ishan v. Ramranjan*, 2 C.L.J. 125; *Muthurakkoo v. Orr*, 35 Mad. 618 (621). See Note 621A under Art. 144.

An encroachment made by a tenant on the property of his landlord should not be presumed to have been made absolutely for his own benefit and as against the landlord, but should be deemed to be added to the tenure and to form part thereof—*Esubai v. Damodar*, 16 Bom. 552 (558). The true presumption as to encroachments made by a tenant on the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof *for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord*, unless it clearly appears by some act done at the time that the tenant made the encroachments for his own benefit—*per* Markby J. in *Gooroo Dos v. Ishwar Chandra*, 22 W.R. 246; *Muthurakkoo v. Orr*, 35 Mad. 618 (622). But this view has been dissented from in later cases of the Calcutta High Court. Thus, in *Nudhyar Chand v. Meqan*, 10 Cal. 820 (822) Garth C. J. observes: "It would seem strange, if as a matter of law, a tenant were allowed without his landlord's permission, to

appropriate any land which adjoins his own tenure, and then when his landlord complained of the trespass and required him to give the land up, he were allowed to take advantage of his own wrong, and insist upon retaining possession of it until the expiration of his tenure." In *Prothad Teor v. Kedar Nath*, 25 Cal. 302, it has been held that if a tenant encroaches upon the adjoining lands of his landlord, the landlord may if he chooses treat him as a tenant in respect of the land encroached upon, but the tenant has no right to compel the landlord against his will to accept him as a tenant in respect of that land. In another case *Mookerjee J.* observes: "An encroachment made by a tenant upon the adjoining waste land of his landlord, is *prima facie* made by him in his character as a tenant, but it is open to the landlord to repudiate the relation, to treat him as a trespasser and to evict him as such; on the other hand, it is open to the tenant to indicate at the time he encroaches that he intends to hold the encroached lands for his own exclusive benefit, and not to hold them as he held the lands to which they are adjacent; in this event the landlord, though willing to treat him as a tenant, may be driven, by an assertion of a hostile title, to a suit to eject him as a trespasser—*Ishan v. Ram Ranjan*, 2 C.L.J. 125

It has been held in some cases that the tenant's possession of the encroached lands can only commence to be adverse when a title adverse to the landlord is asserted or when the landlord becomes aware of the encroachment; in other words, the tenant is bound to prove that he set up a right of tenancy to the encroached lands to the knowledge of his landlord—*Ishan v. Ramranjan*, 2 C.L.J. 125; *Wali Ahmed v. Tota Mea*. 31 Cal. 397 (403); *Krishna Gobinda v. Banku Behari*, 13 C.W.N. 698, 4 I.C. 526. But the Madras High Court holds that this rule is stated in too broad terms, that the ordinary rule of law is that possession held by a person in his own right is adverse to the true owner, whether the owner is aware of such possession being taken or not, and that a tenant is not bound to prove that his encroachment was known to the landlord—*Muthurakkoo v. Orr*, 35 Mad. 618 (622). At any rate, where the tenants were cultivating the encroached lands for a considerable length of time (e.g., 30 years), the landlord's knowledge of the encroachment will be presumed—*Ibid*.

598. Discontinuance of possession.—Discontinuance refers to a case where the person in possession goes out and is succeeded in possession by another—*Brojendra v. Sarojini*, 20 C.W.N. 481, 31 I.C. 242, 22 C.L.J. 283; *Sheikh Sohnur v. Huttman*, 1 C.W.N. 277; *Charu Chandra v. Nahush Chandra*, 50 Cal. 49 (63), A.I.R. 1923 Cal. 1, 74 I.C. 630. "The difference between dispossession and discontinuance of possession may be expressed in this way—the one is where a person comes in and drives out the others from possession; the other case is where the person in possession goes out and is followed into possession by other persons"—*per Fry J.* in *Rains v. Buxton*, (1880) 14 Ch. D. 537 (539). "The word 'discontinuance' means an abandonment of possession followed by the actual possession of another person. This I think

The mere fact that a mine has not been worked by the owner does not amount to discontinuance of possession—*Bengal Coal Co. Ltd. v. Monoranjan*, 22 C.W.N. 441, 44 I.C. 297.

A person by merely living outside the village cannot be said to have abandoned the site in the village in which he once had his residential house which has fallen down and has not been re-built for many years. Possession in case of such vacant site is presumed to go with title, and its mere use by a neighbour for the purpose of tethering his cattle thereon cannot be regarded as adverse possession—*Lachman Das v. Narsingh Das*, 101 P.L.R. 1916, 36 I.C. 207.

The owner of a property who had accorded permissive occupation of the same to a person on the ground of charity or relationship cannot be said to have discontinued possession of the property, within the meaning of this Article, because under such circumstances the possession of the occupier is the possession of the owner—*Govind Lall v. Debendranath*, 6 Cal. 311 (315); where therefore the owner seeks to recover the premises so occupied, the suit does not fall under this Article but under Article 144, and limitation runs from the time when the occupation of the tenant became adverse to the owner—*Gobind Lall v. Debendranath*, 6 Cal. 311, 314 (reversing on appeal *Govind v. Debendranath*, 5 Cal. 679). Where the plaintiff's husband conveyed to her a house in 1893 in satisfaction of her dower, but continued to reside in the house as before till his death in 1911, whereupon the defendant (the son of the plaintiff's husband by another wife) took forcible possession of the house, and then the plaintiff sued to recover possession, held that, having regard to the relationship, the possession of the plaintiff's husband from 1898 to 1911 was only permissive occupation and did not amount to dispossession or discontinuance of possession of the plaintiff, and that consequently the plaintiff must be deemed to have held possession up to 1911—*Ibrahim v. Isa Rasul*, 41 Bom. 5 (12).

Where on default of payment of Government revenue by a co-sharer, possession of his share was made over to another by Government on a farming lease, which expired in 1871, but on the expiry of the lease the lessee still retained possession for over twelve years, and the original owner or his representative made no claim during the period, held that there was a discontinuance of possession by the original owner from 1871 within the meaning of this Article—*Mudho v. Surjan*, 28 All. 281 (283).

599. Attachment by Magistrate :—An attachment by the Magistrate under sec. 146 Criminal Procedure Code, does not amount to dispossession of the true owner from the property attached, nor does it amount to a discontinuance of possession by the owner. Although the actual or physical possession is with the Magistrate, it is merely a custody or detention on behalf of the true owner pending the decision of the Court of competent jurisdiction. The legal possession will, during the attachment, be with the true owner. Consequently, a suit for declaration of title to the property attached is not a suit for possession under Article 142 or 144 but falls under Article 120—*Rajah of Venkatagiri v. Isakapalli*.

But if after attachment, the Magistrate puts the defendant in possession of the property, then of course there is actual dispossession of the plaintiff and a suit by the plaintiff against the defendant would be governed by this Article—*Nisarali v. Adibuddi* 16 C.W.N. 1073, 16 I.C. 620

But in the case of an attachment under sec. 145 Cr. P. Code, the possession of the Magistrate during attachment should enure for the benefit of the party who may be declared by the Magistrate under sec. 145 (4) to be the person in possession at the date of the proceedings; such person may not be the same who may be declared by the Civil Court to be the true owner of the property in dispute. The attachment under sec. 145 is different from an attachment under sec. 146, Cr. P. Code—*Abinash Chandra v. Tarini*, 30 C.W.N. 541, 95 I.C. 117, A.I.R. 1926 Cal 782

When property, which is in dispute between two parties, is attached and taken possession of by the Collector for the protection of the Government revenue, it is his duty, after crediting the Government revenue and paying the collection expenses, to pay over the surplus of the rents collected to the real owner. And so long as the Collector retains possession, his possession must be held to be on behalf of, and not adverse to, the real owner. Nor does the Collector's possession become one on behalf of the defendant, simply because he afterwards delivers possession to the defendant in consequence of a decree—*Karan Singh v. Bakar Ali Khan*, 5 All. 1 (6) (P.C.)

Possession of Receiver:—The possession of a Receiver appointed by the Civil Court stands on the same footing as the possession of a Magistrate during an attachment under sec. 146 Cr. P. Code. When disputes arise between claimants as to possession of immoveable property, and the property is placed in the hands of a Receiver by the Court pending the determination of the question of title, the Court takes possession through its Receiver on behalf of the party who may ultimately establish his title, and from the moment the title is established, possession must be deemed to have been the possession of the lawful owner whose title has been established. While the Court (through its Receiver) holds possession for the benefit of the rightful owner, the previous possession on the part of the wrongdoer cannot, by any legal fiction, be

deemed to continue so as to be available towards the ultimate acquisition of title against the true owner. The possession of the Receiver on the attachment by the Magistrate does not amount to dispossession of the owner or to discontinuance of his possession—*Bisheshwar v. Chandreshwar*, 7 Pat 319, A.I.R. 1928 Pat. 260 (262, 263), 108 I.C. 89, following *Sarat Chandra v. Bibhabati*, 34 C.L.J. 302, A.I.R. 1921 Cal. 584, 66 I.C. 433.

600. Burden of proof—In a case falling under this Article, the plaintiff must at the outset show that he had been in possession within twelve years before suit, and cannot rest merely on a proof of title; (while in cases falling under Art. 144, the plaintiff may rest content with proof of title only, and the burden lies on the defendants to show that they have had a possession inconsistent with the title of the plaintiff more than twelve years before suit)—*Faki v. Babaji*, 14 Bom. 458 (461), *Ibrahim v. Isa Rasul*, 41 Bom. 5 (11); *Moro Desai v. Ram Chandra*, 6 Bom. 508, *Monomohan v. Mothura Mohan*, 7 Cal. 253; *Udit Narain v. Golab Chandra*, 27 Cal. 221 (P.C.); *Mohima Chunder v. Mohesh Chunder*, 16 Cal. 473 (P.C.), *Gopaul v. Nilmoney*, 10 Cal. 374, *Kashinath v. Shridhar*, 16 Bom. 343, *Kuppuswami v. Chockalinga*, 49 M.L.J. 788, A.I.R. 1926 Mad. 181, 91 I.C. 454; *Innasimuthu v. Upakarath*, 23 Mad. 10 (P.C.); *Ramayya v. Kotamma*, 45 Mad. 370 (374); *Jafar Ali v. Mashuq*, 14 All. 193, *Haji Khan v. Baldeo*, 24 All. 90 (93); *Komul Prasad v. Bharat*, 23 A.L.J. 874, *Mirza Shamsher v. Kunjbehari*, 12 C.W.N. 273, *Asghar Reza v. Mehdi*, 20 Cal. 560 (P.C.); *Mahomed Ali v. Khoja Abdul*, 9 Cal. 744, 750 (F.B.), *Rani Hemanta Kumari v. Jagadindra*, 10 C.W.N. 630 (P.C.), *Midnapore Zamindari Co. v. Panday*, 2 P.L.J. 506, 41 I.C. 114; *Dharani Kanta v. Gabar Ali*, 17 C.W.N. 389 (P.C.), 18 I.C. 17; *Rakhal Chandra v. Durgadas*, 26 C.W.N. 724, A.I.R. 1922 Cal. 557, *Mazhar Hasain v. Behari*, 28 All. 760; *Muthia Chetty v. Seena*, 56 I.C. 951, 12 Bur. L.T. 234; *Inder Lal v. Ram Surat*, 5 P.L.J. 724 (728); *Shiva Prasad v. Hira Singh*, 6 P.L.J. 478 (491, 525) (F.B.) Where there is no evidence or no evidence of any value, on behalf of the plaintiff as to his possession at any time during 12 years before suit, the plaintiff's case will fail; and in such a case, it is immaterial that the defendant's evidence is weak or if he offers no evidence—*Shiva Prasad v. Hira Singh*, 6 P.L.J. 478 (525), A.I.R. 1921 Pat. 237, 62 I.C. 1.

But the plaintiff need not prove *actual user*; for in fact possession is not necessarily the same thing as actual user; and if the land is of such a nature as to render it unfit for actual enjoyment in the usual modes (as for instance where the land was a narrow slip of unenclosed land adjoining a public lane and unsuitable for agriculture) it may be presumed that the possession of the plaintiff continued until the contrary is proved—*Inder Lal v. Ram Surat*, 5 P.L.J. 724, 58 I.C. 773. The nature of the possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. If the land is either permanently or temporarily incapable of actual enjoyment in any of the customary modes (residence or tillage or

receipt of rent), as in the case of land covered with sand by inundation or jungle land, it would be unreasonable to look for the same evidence of possession as in the case of a house or cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such case, when he has done this his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed—*Mahomed Ali v. Khaja Abdul Gunny*, 9 Cal. 744 (751) (F.B.); *Thakur Singh v. Bhogeraj*, 27 Cal. 25 (28, 29); *Rakhai Chandra v. Durgadas*, 26 C.W.N. 724, A.I.R. 1922 Cal. 557, 67 I.C. 673, *Gopal Chandra v. Monmohini*, 31 C.W.N. 800, 105 I.C. 369, A.I.R. 1929 Cal. 118; *Ala Baksh v. Bir Bikram Kishore*, 33 C.W.N. 1161 (1162).

In case of waste land, tank land or jungle land, situate within the zemindary of the plaintiff, *prima facie* evidence of his possession within 12 years anterior to the date of the suit must be given, but in determining this question, evidence of physical acts of enjoyment and user indicating possession is not necessary—*Sheo Narain v. Badal*, 8 O.C. 177.

So also, it is sufficient if the plaintiff can prove that he was in constructive possession of the property within twelve years before suit, by virtue of his title thereto. If it is proved that he had title to the land, it is not necessary for him to exercise overt acts of ownership—*Barjor Singh v. Sidh Nath*, 1 Luck. 441, A.I.R. 1927 Oudh, 141, 98 I.C. 704.

Proof of symbolical possession would be sufficient in a case where such possession amounts to actual possession in the eye of law. Thus, in the case of a bare site, symbolical possession obtained by the plaintiff is equivalent to actual possession. Therefore, where the plaintiff purchased a land, which was a bare site, in a Court-sale in July 1902, and obtained symbolical possession through Court in October 1904, and he alleges that he was ousted therefrom in 1914 and he brought the present suit for possession in March 1916, it was held that the symbolical possession was equivalent to actual possession of the plaintiff, and the defendant could defeat his claim only by showing an adverse possession for more than twelve years—*Kaman v. Umra*, 76 P.R. 1918, 47 I.C. 441. See also Note 621B under Art. 144.

In a case falling under Art. 142, the defendant will not have to prove that his possession was adverse; the word 'adverse' does not occur in Article 142; the question under this Article is whether the plaintiff while in possession has been dispossessed or has discontinued the possession more than 12 years before suit—*Mahammad Amanulla v. Badan*, 17 Cal. 137 (143) (P.C.); *Gursahai v. Chedi*, 27 O.C. 130, 79 I.C. 964, 1 O.W.N. 38. No question of adverse possession arises for determination in a suit under Art. 142. It is not for the defendant to raise and prove adverse possession in order to show that the suit is time-barred. The plaintiff has to prove possession and dispossession within a period of 12 years prior to suit—*Sita Ram v. Ram Sunder*, 50 All. 813, A.I.R. 1928 All. 412 (413), 26 A.L.J. 573.

The plaintiff cannot, merely by proving possession at any period prior to 12 years before suit, shift the onus to the defendant—*Mahomed Ali v. Khaja Abdul*, 9 Cal. 744 (750) F.B. (dissenting from *Kally Churn v. Secretary of State*, 6 Cal. 725), *Maharaja Koonar Singh v. Nund Lal*, 8 M I A. 199 (220); *Suresh Chandra v. Shiti Kantha*, 51 Cal. 669, 28 C.W.N. 637, A.I.R. 1924 Cal. 835. Even the fact that the defendant admits that the land in dispute once belonged to the plaintiff at some time or other (not necessarily within 12 years prior to suit) does not shift the onus to the defendant of proving adverse possession—*Mazhar Husain v. Behari Singh*, 28 All. 760 (762). Where in a suit for possession, all that is proved is that the plaintiff was at one time the owner, but that for the last 15 or 20 years the defendants have been in possession, and the plaintiff claims that they obtained possession from him, the suit falls under Article 142, and if the plaintiff fails to prove the permissive nature of the defendants' occupation, the burden would lie on the plaintiff to show that he had been in possession within 12 years before suit. If he had proved the permissive occupation of the defendants, then the burden would have been shifted to the defendants of proving that they had acquired title by 12 years adverse possession—*Maung Gyi v. Maung On*, 7 Rang. 85, 117 I.C. 591, A.I.R. 1929 Rang. 153 (154, 155).

In a suit falling under Article 142, the plaintiff has to prove possession and dispossession within 12 years. If he proves his possession 10 years ago, and that he is not in possession at the time of suit and that the defendant is, then it follows that the defendant has dispossessed him at some time known or unknown within 10 years. The suit is therefore not barred. It is not necessary for the plaintiff to prove the actual date of dispossession—*Daim v. Khanu*, 8 Lah. 655, A.I.R. 1923 Lah. 93, 29 P.L.R. 77. If the plaintiff can prove that he was in possession within 12 years before suit, the burden lies on the defendants of proving a present title to the land in themselves, before they can succeed—*Sudama v. Kesho*, 102 P.R. 1879.

Where in a suit for ejectment, the record of rights raises a presumption in the plaintiff's favour, the onus is shifted to the defendant to establish affirmatively that the plaintiff has been out of possession for more than 12 years—*Sheikh Barkat v. Basant*, 21 C.W.N. 175, 39 I.C. 356.

In a suit for possession of certain land as having accreted to plaintiff's village by alluvion, it lies on the plaintiff to prove both title and possession within 12 years. If the plaintiff's title is proved, he may succeed either by proving that the land in suit had accreted by alluvion within the limitation period; or the plaintiff may prove that although the land had accreted more than 12 years before suit, it had remained within the limitation period water or jungle land, in respect of which the presumption would arise that possession followed title—*Habibulla v. Latta Prasad*, 34 All. 612 (614).

Where a vendee of immovable property sues for possession, his vendor not having been in possession at the time of sale, it lies upon

the plaintiff to show that his vendor was in possession at some period within twelve years prior to the date of the sale—*Datta v. Rohagi*, 28 All. 470 (480); *Kashinath v. Shridhar*, 16 Bom 343 (346). But see these cases commented on in Note 574 under Article 136.

The quantum of evidence of possession which it will be necessary for the plaintiff to adduce will depend on the circumstances of each case. In some instances, very slight evidence may be sufficient to shift the burden of proof on the defendant. Thus, in dealing with the question of possession as between brothers and sisters in native families, regard must be had to the conditions of life under which such families live and to the fact that in such families the management of the property of the family is, by reason of the seclusion of the female members, ordinarily left in the hands of the male members. In the case of such families, slight evidence of enjoyment of income arising from the property is sufficient *prima facie* proof of possession—*Inayat Husen v. Ali Husen*, 20 All 182 (185).

601. Presumption —*Possession follows title*—“If there are two persons in a field each asserting that the field is his and each doing some act in the assertion of the right to possession, and if the question is which of these two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser”—per Lord Selborne in *Lows v. Telford*, (1876) 1 A C 415. In a case falling under Article 142, the plaintiff will have to prove not only that he had a title to the land, but that he was in possession within 12 years before the suit. “Where in an ejectment suit the plaintiff alleged dispossession by defendant eleven years before suit, the onus of proving plaintiff’s possession prior to his dispossession lies upon him (plaintiff), and in this question of evidence, the mutual fact of the plaintiff’s title comes to his aid with greater or less force according to the circumstances established in evidence”—*Rani Hemanta Kumari v. Jagadindra*, 10 C W N. 630 (P C), 8 Bom L R 400, 16 M L J 272, 3 A L J 363. It is not sufficient to enable the plaintiff to succeed in the suit merely to prove that at some date antecedent to a period of 12 years prior to the institution of the suit he had acquired some paper title to the land, he must also prove that he was in possession within 12 years prior to the suit. This possession will be presumed from title under certain circumstances. Thus, where the evidence of possession on behalf of the plaintiff and on behalf of the defendant as to the former’s possession within 12 years before suit, is strong and evenly balanced, the presumption that possession goes with title will prevail—*Raja Shiva v. Hira Singh*, 6 P L J. 478 (525) (F.B.) 62 I C 1, *Runjeet Ram v. Goburdhan*, 20 W.R 25 (P.C.); *Fakir v. Munshi Ramcharan*, 35 I.C. 554, 1 P.L.J. 146 (148); *Dhurm Singh v. Hur Persad*, 12 Cal. 38 (40), *Nawab Bahadur v. Goni Nath*, 13 C.L.J 625, 6 I.C. 392 (397), *Thakur Singh v. Bhogeraj*, 27 C 25 (27); *Kasturi v. Rajkumar*, 8 C W N 876. The law presumes possession follows title and does not favour forcible entry into possess by trespassers—*Tukaram v. Tukaram*, A.I.R 1927 Nag. 37, 97 I C. 10.

But if it is found that the evidence produced by both the plaintiff and the defendant as to possession is unworthy of credit, the plaintiff's suit must fail, in as much as the presumption which arises upon proof of title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given—*Raja Shiva Prasad v. Hira Singh* 6 P.L.J. 478 (491) (F.B.), 62 I.C. 1, (overruling *Bhikhad Bhunjan v. Upendra Nath*, 4 P.L.J. 463); *Fakira v. Munshi Ramcharan*, 1 P.L.J. 146 (148), 35 I.C. 554, *Thakur Singh v. Bhogeraaj*, 27 Cal 25 (27); *Lala Singh v. Latif Hossein*, 21 C.L.J. 480, 28 I.C. 477; *Kasturi Singh v. Rajkumar*, 8 C.W.N. 876. If the plaintiff's title is established to a land which emerged in 1905 after diluvion, and it is found that he was not dispossessed before 1908, he must be deemed to have been in possession from 1905 up to 1908 and thereafter till he was actually dispossessed, and a suit brought in 1917 was not barred—*Satish Chandra v. Birendra*, 33 C.W.N. 1016 (1023) (P.C.), 56 I.A. 305, A.I.R. 1929 P.C. 225, 118 I.C. 259

Where the land is of such character (e.g., vacant site, waste or jungle land or land under water) that proof of any act of possession in the usual modes is substantially impracticable, it will be presumed that possession follows title and plaintiff may therefore give proof of title only, and the onus will be shifted upon the defendant to prove that he acquired the ownership by adverse possession—*Raja Shiva Prasad v. Hira Singh*, 6 P.L.J. 478 (525) (F.B.), 62 I.C. 1; *Rakhal Chandra v. Durgadas*, 26 C.W.N. 724, A.I.R. 1922 Cal. 557; *Srinivasachariar v. Raghava*, 46 M.L.J. 560, A.I.R. 1924 Mad. 676, 79 I.C. 1011; *Mahammad Saheb v. Tilokchand*, 46 Bom 920 (924), A.I.R. 1922 Bom. 243, 66 I.C. 764, 24 Bom. L.R. 373; *Midnapore Zamindari Co. v. Panday*, 2 P.L.J. 506 (509), 41 I.C. 114, *Mahomed Ali v. Khaja Abdul Gunny*, 9 Cal. 744 (751) (F.B.), *Ganapati v. Raghunath*, 33 Bom. 712 (717); *Habibulla v. Lalta Prasad*, 34 All 612 (614), *Syed Sadik Husain v. Etizad*, 13 O.L.J. 798, 101 I.C. 714, A.I.R. 1927 Oudh 209; *Sheo Narain v. Badal*, 8 O.C. 177. If the property in dispute has, up to a short time before suit, remained waste and unoccupied, it is not necessary for the plaintiff to prove acts of possession within 12 years of suit; he has only to prove *prima facie* title not extinguished by limitation; and the possession will be presumed to follow title. The onus will be shifted on to the defendant to prove when his possession became adverse—*Ramzan Ali v. Basharat Ali*, 105 P.R. 1901, *Muhammad Yar v. Ghulam*, 49 P.R. 1884; *Narain Devi v. Billa*, 204 P.L.R. 1914, 25 I.C. 82. Where the plaintiff purchased a shop and two open sites adjacent to it, and sued to recover possession of the open sites alleging that he had been unlawfully dispossessed by the defendants, and the plaintiff's title to the open sites was proved, held that in view of the position of the open sites with reference to the shop (of which the plaintiff was in possession) the presumption was that possession of the open sites followed title, even though the evidence of possession in regard to the open sites was equally unworthy of credit on both sides—*Mahammad Sahab v. Tilokchand*, 46 Bom. 920 (925), 24 Bom. L.R. 373, A.I.R. 1922 Bom. 243, 66 I.C. 764

Where land is unenclosed, acts of ownership in one part may be presumed to be acts of ownership over the whole, unless there are circumstances rebutting that presumption. It is not necessary that a person should use any definite portion of an unenclosed land in assertion of his ownership—*Vithaldas v. Secretary of State*, 26 Bom 410 (417).

Where the land in dispute is uninhabited or uncultivated, and no acts of ownership or possession by any person have been exercised over it, it is often necessary for the purpose of deciding the question of limitation to rely upon slight evidence of possession and sometimes possession of the adjoining land, coupled with evidence of title, such as grants or leases, and the Courts are justified in presuming under such circumstances that the party who has the title has also the possession—*Mohima Chunder v Hurro Lal*, 3 Cal 768 (769, 770)

In respect of jungle or hilly land, possession must be presumed to be with the person having title. This presumption, however, would cease to be operative after the land is cleared of jungle and brought under cultivation—*Mirza Shamsher v. Munshi Kunj Behari*, 12 C.W.N. 273.

Diluviated lands :—Where lands are by natural causes placed wholly out of the reach of their owner, as in the case of *diluvion* by a river, if the plaintiff (who is the true owner) shows his possession down to the time of the diluvion, his possession is presumed to continue as long as the lands continue to be submerged—*Mazhar v Bihari*, 28 All. 760 (762), *Mahomed Ali v. Khaja Abdul Gunny*, 9 Cal 744 (751) (F.B.), *Gunga v. Ashutosh*, 23 Cal 863 (866), *Kally Charan v Secretary of State*, 6 Cal 725, *Mono Mohan v. Mothura Mohan* 7 Cal 225, *Basanta Kumar v Secretary of State*, 44 Cal 858 (P.C.) Mere submergence of the land would not put an end to the possession of the owner—*Rampati v. Ramani*, 34 C.W.N. 772 (773) (P.C.) Therefore, in a suit for possession of alluvial lands which were alluviated more than 12 years before suit and were taken possession of by the defendant after reformation, if the plaintiff can prove possession till diluviation, the burden of proving reformation more than 12 years before suit and adverse possession during that period is shifted to the defendant—*Mono Mohan v. Mothura Mohan*, 7 Cal 225; *Radha Gobinda v Inglis*, 7 C.L.R. 364 (P.C.); *Gunga Kumar v. Asutosh*, 23 Cal. 863 (866). If the reformation had taken place more than 12 years before suit, the plaintiffs are required to prove that they were in possession within 12 years of the date of the suit—*Birendra v. Satis Chandra*, 44 C.L.J. 121, A.I.R. 1926 Cal. 1166, 97 I.C. 1003.

Where the plaintiff had an undoubted title to a certain land, but the defendant had no such title and could prove adverse possession for only 10 years before suit, *the land being under water during the first two years of the 12 years immediately preceding the suit*, and no act of possession being proved by either party during the two years of the submergence of the land, *held* that there would be a presumption that possession followed title and that plaintiff's possession continued over the two years in question, i.e., the possession continued to a time within 12 years

prior to the suit, which was therefore not barred—*Rajkumar v. Govind*, 19 Cal 660 (674) (P.C.). If the plaintiff proves that after the land became submerged he exercised acts of ownership, as by letting out the *jalkar* or right of fishing to tenants, held that this was a very strong evidence that the land covered by water over which the right of fishing was enjoyed belonged to the plaintiff. Evidence of the ownership and enjoyment of the *jalkar*, in a small piece of water as in this case (and not in a case of a *jalkar* in a deep and navigable river) is evidence of title to the land covered by the water. In this case the plaintiff has proved his ownership by letting out the *jalkar* to tenants, and this was *prima facie* evidence of possession also—*Mohini Mohan v. Krishna Kishore*, 9 Cal 802 (804, 807). If it was proved that the plaintiff exercised acts of ownership over the land when covered by water, and that when the land became dry it remained waste and did not become fit for cultivation until within six or seven years before suit, held that the Court might and ought to presume that the plaintiff's possession continued after the land became dry, until the contrary was shown—*Mohini Mohan v. Krishna Kishore*, 9 Cal. 802 (807). Where a suit is brought by the owner for recovery of possession of lands disruvated and reformed *in situ*, more than 12 years after the alleged reformation, it lies on the plaintiff to show that his possession continued after reformation to a period within 12 years before the institution of the suit. If he has not admittedly had any actual possession since the lands became submerged, the plaintiff, in order to prove possession may rely on the presumption that possession of the lawful owner continues as long as the land is incapable of actual possession, but if he relies upon this presumption, he must prove that the land was incapable of actual possession within 12 years before suit—*Suresh Chandra v. Shuti Kanta*, 51 Cal. 669, 28 C.W.N. 637, 78 I.C. 679, A.I.R. 1924 Cal. 855.

If a trespasser takes possession of the land, and before he has acquired a title under the statute the land becomes submerged under water, the trespasser's possession does not continue during the period the land is under water. The dispossession by *vis major* (viz., by flood) has the same effect as voluntary abandonment, so that the trespasser will be deemed to have abandoned possession, and the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. The true owner's possession remains and continues during the period of submergence and thereafter, and time runs against him only when another person on the re-appearance and reformation of the land takes actual possession—*Secretary of State v. Krishnomoni*, 29 Cal 518 (535) (P.C.), (overruling the opinion of Garth C.J. on this point in *Kally Charan v. Secretary of State*, 6 Cal. 725); *Basanta Kumar v. Secretary of State*, 44 Cal. 858 (872) (P.C.). This is in accordance with the rule laid down by Lord Macnaghten in *Agency Co. v. Short*, (1888) L.R. 13 A.C. 793: "If a person enters upon the land of another and holds possession for a time, and then without having acquired a title under the statute, abandons possession, the rightful owner, on the aban-

donment, is in the same position in all respects as he was before the intrusion took place."

Therefore, where a land belonging to the plaintiff became submerged under water again and again, and was held by the defendant during the periods of its reappearance, held that during the time the land was under water, it must be deemed to have been in the possession of the plaintiff (the rightful owner). During the months the land was not under water, the defendant was actually in occupation of it, but as soon as it was again submerged, the plaintiff's possession was revived. Consequently there was every year a break in the continuity of the defendant's possession, which enured for the benefit of the plaintiff, and which prevented the defendant acquiring title by adverse possession—*Ram Nain v. Deoki Misir*, 20 A.L.J. 756, A.I.R. 1923 All 75, 69 I.C. 912

602. Commencement of limitation :—In case of dispossession, limitation runs from the date of dispossession, if the plaintiff subsequently obtains possession under a decree obtained in the first Court and is again dispossessed by the decree being reserved on appeal, he does not get a fresh starting point from the date of dispossession upon reversal of the decree; the original dispossession in this case is the starting point of limitation—*Narayanan v. Kannamma*, 28 Mad. 338 (342). But in some Calcutta cases it has been held that if the rightful owner is dispossessed but succeeds in ousting the trespasser without recourse to law and continues in possession, and is subsequently dispossessed by the defendant under a decree obtained by the latter under section 9 of the Specific Relief Act, the period of limitation for a suit by the rightful owner to recover possession will run from the date of dispossession under the decree and not from the date of the original dispossession—*Protap Chandra v. Durga Charan*, 9 C.W.N. 1061, *Mamtazuddin v. Barkatulla*, 2 C.L.J. 1, *Waziruddin v. Deoki*, 6 C.L.J. 472, *Jonab Ali v. Surya Kanta*, 33 Cal 821. Similarly, the plaintiff was ousted from his lands by the defendants in 1905, and brought a suit under sec 9 of the Specific Relief Act which was decreed in 1906, and in execution of that decree the plaintiff got possession in 1907. The defendants then applied for review of the judgment in the Specific Relief Act case and ultimately the plaintiff's suit was dismissed in 1908. After this date the defendants again took possession of the lands by dispossessing the plaintiff, and the present suit was instituted in 1919 for recovery of the lands. Held that time ran not from the date of the plaintiff's original dispossession in 1905, but from the date of his subsequent dispossession in 1908. There can be no constructive possession of a wrong-doer during the time that he is actually not in possession, and the possession of the true owner, no matter how that possession is obtained, must be considered as rightful possession in law, and the period during which the true owner is in possession will enure to his benefit and not to that of his trespasser. Consequently, where the plaintiff being the rightful owner is kept out of possession for less than 12 years, and then succeeds in regaining possession (no matter whether in execution of a decree in a possessory suit or in any other way), and then after a time is again

dispossessed (no matter whether on reversal of the decree or in any other way) and thereafter institutes a suit for recovery of possession, he can base his suit treating the subsequent dispossession as his cause of action under this Article, the period will not run from the date of the earlier dispossession—*Girish Chandra v. Baikuntha*, 81 I.C. 279, A.I.R. 1925 Cal. 270.

603. Extinguishment of title :—When the plaintiff sues for possession and alleges dispossession, but fails to shew that he has brought his suit within 12 years of such dispossession, there is an extinguishment of his title under section 28. Consequently, no declaration of title in his favour can be made—*Bishumbhar v. Nadiar Chand*, 18 C.L.J. 601, 22 I.C. 64 (65).

604. Tacking of adverse possession :—Both under Articles 142 and 144 the defendant may tack the period of his adverse possession to the period of such possession held by a previous adverse possessor (provided the periods are continuous). Under Article 144, the succeeding adverse possessor must be one who *claims through the preceding possessors*, and must *not be an independent trespasser* (see Note 622 under Article 144, under heading "Tacking of adverse possession"); but there is a difference of opinion among the High Courts (as well as among the commentators) as to whether the same condition is required under the present Article. The view of the Madras High Court is, that under Article 142, adverse possession for over 12 years by several persons in succession, *even though they do not claim from one another*, bars the true owner—*Ramayya v. Kotamma*, 45 Mad. 370 (375), 42 M.L.J. 319, 67 I.C. 246, A.I.R. 1922 Mad. 59. This view finds its support from the following observations of Kay L. J. in *Willis v. Earl Howe*, [1893] 2 Ch. 545: "It was suggested by the Counsel in reply thatif a series of occupiers not claiming under one another kept out the real owner for 100 years, time would only run against him from the moment when the last of such occupiers entered into possession. I am of opinion that this is not the law. A continuous adverse possession for the statutory period, though by a succession of persons *not claiming under one another does*, in my opinion, bar the true owner." The same opinion has been expressed by Dart in his *Vendors and Purchasers* (7th Edn.) Vol. I, page 474: "In order that the title of the true owner may be barred by the adverse possession of a trespasser, or a series of trespassers, the possession by them must be continuous and so long as it is continuous, it is immaterial whether they claim through one another or *independently*." A similar view has been taken in the English case of *Doe v. Barnard*, (1849) 13 Q.B. 945, 18 L.J.Q.B. 306. In this case the owner of a house was dispossessed and the dispossessor remained in possession till his death, for less than 12 years; thereupon his widow who had been living with him in the same house took possession and remained in possession for less than 12 years, but the aggregate period of possession of the husband and the widow was more than 12 years. It was held that the true owner was barred by the successive possession

of the husband and widow for more than 12 years, although the widow did not claim from or through her husband as heiress or legatee or otherwise. So also, U. N. Mitra in his *Law of Limitation*, 5th Edn., p. 1160 observes: "The question of limitation under Article 142 does not depend on continuous possession for 12 years by the defendant, but on the fact that more than 12 years have elapsed since the plaintiff was dispossessed or discontinued the possession. The last of several successive but independent trespassers may, therefore, defeat the plaintiff's suit, although he himself has been in possession for only a few days before the suit." This view of Mr. Mitra is based on the decision of *Willis v. Earl Howe* (cited supra). On the other hand, Mr. Rustomji is of opinion that no distinction should be made between Articles 142 and 144 and that the same rule is applicable to both articles. "Even under Article 142 possession of independent (though successive) trespassers cannot be tacked, in as much as immediately upon the cessation of possession by one trespasser, the rightful owner is (in point of law) restored to possession, and the entry of another trespasser is tantamount in law to a fresh dispossession of the owner, and the latter has accordingly 12 years under Article 142 reckoned from such constructive fresh dispossession"—Rustomji's *Limitation*, 3rd Edn., p. 646; and the learned author has supported his statement by the decision in *Solling v. Broughton*, [1893] A.C. 556. Mr. Starling is also of the same opinion, because he observes that "the case of *Willis v. Howe* is based upon the construction of the English Limitation Act (3 & 4 Wm IV, C. 27), and it is not quite clear whether the Legislature in India intended to reproduce in Articles 142 and 144 the law existing in England. The only question for the Courts in India to consider is whether one trespasser dispossessing another can be said to derive his right to sue or the liability to be sued from that trespasser (according to the definition of plaintiff and defendant)" —Starling, 5th Edn., p. 410. The Calcutta High Court is also of opinion that even under Article 142, one trespasser cannot add to his own possession the previous independent possession of another trespasser. When the possession passes from the first to the second trespasser there is a constructive restoration, even if a momentary restoration, of the true owner's title to possession,—*Janaki Nath v. Baikuntha Nath*, 36 C.L.J. 140, A.I.R. 1922 Cal 176. The same view has been taken by the Rangoon High Court in *Ma Mi v. Hadji Mahomed*, 1 Rang 176, 75 I.C. 31, A.I.R. 1923 Rang 261.

If the period of possession by successive trespassers is *not continuous*, the running of time in favour of the trespassers is stopped, as soon as there is an interval. As Dart observes. "If a period of time should elapse, however short, after the abandonment of one trespasser who has not been in possession for the full period, and before the entry of another, the title of the true owner is as from the time of such abandonment, restored to him without any entry or act done on his part, for the statute does not apply to a case of want of actual possession by the true owner, but only to cases where the owner is out of possession and another is in possession for the prescribed time"—*Vendors and Pur-*

chasers, p. 474. See also the observation of Lord Macnaghten in *Agency Co. v. Short*, cited at p. 612 ante.

605. Suits under this Article :—Where a non-occupancy raiyat has been dispossessed of his holding either by a trespasser or by the landlord otherwise than in execution of a decree, then if his tenancy has not yet been determined, he has a title in him viz. the title of a tenant, and a suit by the raiyat to recover possession by establishment of his title is not a suit under section 9 of the Specific Relief Act; consequently Article 3 cannot apply but either Article 120 or 142—*Tamizuddin v. Ashrub Ali*, 31 Cal. 647 (651) F.B. (overruling *Bhagabati v. Luton Mandal*, 7 C.W.N. 218). A suit by a minor on attaining majority to set aside a mortgage by conditional sale made by a *de facto* guardian, and for possession, is governed by this Article, and not Art. 91, because the setting aside of the deed of conditional sale is subservient to the claim for possession, and the suit must be treated as one for the recovery of immoveable property—*Ramausar v. Raghubar*, 5 All 490 (491). A suit to recover property by setting aside a void deed of transfer, which does not require to be set aside or cancelled, is governed by this Article, and not by Art 91—*Banku Behari v. Kristo Gobinda*, 30 Cal 433 (438).

A suit by the landlord against the purchaser of a permanent tenure from a tenant, who has forfeited his tenancy by breach of a covenant in the lease, whereby the landlord was entitled to re-enter in case the lessee transferred his interest by sale, gift or otherwise, is governed by this Article and not by Art 1, Sch. III of the Bengal Tenancy Act, because the tenancy being forfeited, the purchaser in this case cannot be called a 'tenant' under sec. 155 of that Act but is merely a trespasser—*Dwarika v. Mathura*, 21 C.W.N. 117, 34 I.C. 833 (837). Where a Municipality pulled down a structure erected by the plaintiff on his own ground, which the Municipality claimed as part of the public road, a suit by the plaintiff to recover possession of the ground is governed by this Article and not by Article 39 (which refers only to suits for damages for trespass, and not to suits to recover possession from a trespasser) and must be brought within 12 years from the time the structure was pulled down—*Jaharmal v Municipality of Ahmednagar*, 6 Bom 580 (582). Where the plaintiffs bring a suit to eject the defendants from a house on the ground that the latter have been holding the house as the tenants of the plaintiffs, and have denied the title of the plaintiffs as landlords, and it is found that the defendants are not the tenants of the plaintiffs, held that the suit falls under Art. 142 and not under Art. 144—*Gur Sahai v. Chheddi*, 27 O.C. 130, A.I.R. 1925 Oudh 42, 1 O W N. 38, 79 I C. 964. A suit by a purchaser of immoveable property, alleging that the defendant has dispossessed the plaintiff's vendor, is governed by this Article—*Kuppuswami v. Chockalinga*, 49 M L J 788, A I R 1926 Mad. 181, 19 I C. 454, *Deba v. Rohtagi*, 28 All. 479; *Kashinath v Sridhar*, 16 Bom. 343. But Art 136 might have been applied.

This Article has no application to a case where the plaintiff has been excluded from a joint-family property. Art 127 (which is more specific) applies to the case—*Urish v. Jagadis*, 1 C.W.N. 543 (544)

143.—Like suit, when Twelve When the forfeiture is the plaintiff has be- years. incurred or the condition is broken. come entitled by reason of any forfeiture or breach of condition.

606. Scope :—This Article applies only to those cases where the landlord is entitled, according to the terms of the tenancy, to take khas possession as soon as a breach of condition occurs: that is, where it is expressly stipulated in the contract of tenancy that if the tenant breaks any condition of the tenancy, the landlord will be entitled to eject him. In other words, this Article applies only where the suit for possession is based on a breach of contract. If however there is no express stipulation in the contract of tenancy for ejectment and khas possession in case any breach of condition occurs, a suit by the landlord for ejectment of the tenant for breach of a condition is a suit based on *tort* and not on breach of contract and this Article cannot apply, because it cannot be said that the landlord has become 'entitled to possession by reason of a breach of condition' within the meaning of this Article. In fact, in such a case the landlord will not be primarily entitled to eject the tenant; his primary relief will be an injunction calling upon the tenant to make good the breach of condition and to pay damages to the landlord, and the landlord can pray by way of *secondary* relief only that if the tenant fails to comply with the injunction, the Court may award khas possession to him. See *Sharoop v. Joggeswar*, 26 Cal 564 (at p 568) where the law is, however, very briefly stated. Thus, where the landlord is entitled to possession, not on breach of condition of the tenancy, but upon non-compliance by the defendant with the order of the Court as to filling up a tank and making compensation, the suit is framed in *tort*, and not on breach of any contract, and Article 32, and not 143, applies—*Sharoop v. Joggesur*, (supra)

A suit for possession on the ground of forfeiture does not fall under this Article where the relationship of landlord and tenant does not exist and has never existed between the parties—*Abinash v. Narhari* 57 Cal 289, A I R 1930 Cal 165 (167), *Bhairab v. Kadam*, *infra*. Thus, in 1894 the plaintiff sued the defendant for arrears of rent, the defendant denied the relationship of landlord and tenant, and the suit was eventually dismissed in 1895 on the ground that the relationship had not been established. A suit for recovery of possession was then brought after 12 years. Held that Article 143 did not apply because the relationship of landlord and tenant did not exist between the plaintiff and the defendant, that Article 144 applied, and as the defendant had been in possession for

more than 12 years before suit, and as the circumstances of his possession made it manifest that it was adverse, the suit was barred—*Bhairab Chandra v. Kadam Bewa*, 18 C.L.J. 553, 22 I.C. 28 (30).

This Article is not limited to suits brought against the persons who themselves incurred the forfeiture or committed a breach of the condition against alienation, but it also applies to suits against the persons who are in possession by reason of the alienation which has entitled the forfeiture. The general scheme of Arts. 140-144 does not place any limitation as to parties, and these Articles apply to suits against *any body who may be in possession* of the property—*Ayyaswami v. Manavikrama*, 58 M.L.J. 89, A.I.R. 1930 Mad. 430 (432), 124 I.C. 273. Thus, this Article has been applied to a suit to recover possession (by reason of forfeiture) from the *alienees* of the property—*Zamorin v. Samu Nair*, 38 M.L.J. 275, A.I.R. 1922 Mad. 29, 55 I.C. 380. So also, this Article was applied to a suit brought by a lessor to recover possession, in which the transferees from the lessee were made parties—*Motilal v. Chandra*, 24 C.W.N. 1064, 60 I.C. 312.

607. Forfeiture :—A permanent tenant forfeits his rights and his possession becomes adverse from the date he denies his landlord's title (e.g., by making an alienation, and denying the landlord's title as owner in the deed of alienation); and consequently a suit for possession brought by the landlord 12 years after the date of denial (*viz* the date of the alienation) is barred by this Article—*Locha Ram v. Jhindwadda*, 76 P.L.R. 1917, 36 I.C. 565 (567). But it is open to the landlord to condone the first forfeiture and afterwards to bring a suit within 12 years *from the time when another separate and distinct act occasioning forfeiture has occurred*—*Locha Ram v. Jhindwadda*, 141 P.L.R. 1916, 35 I.C. 235. In case of successive forfeitures, the fact that the landlord did not exercise his right of enforcing one forfeiture does not bar him from enforcing a subsequent forfeiture or raise any estoppel against him—*Zamorin of Calicut v. Samu Nair*, 38 M.L.J. 275, 55 I.C. 380 (382). But in 4 All. 493 (cited in Note 608 below) time was held to run from the first breach of condition and not from a *subsequent* breach.

Certain lands in Malabar were demised on *anubhavam* tenure, and some of them were alienated by the tenant. More than 12 years after alienation the landlord sued to eject the tenant on the ground that the defendant had alienated his right over the property contrary to the terms of his holding and had thereby forfeited the tenancy. *Held* that assuming that the rights under the demise were forfeited by the alienation, the suit was barred under this Article—*Madavan v. Athi Nangiyar*, 15 Mad 123 (124). A Hindu widow entered into a *solenamah* with her deceased husband's cousin, which provided that she would remain in possession for life of a share of the family property, that she would have no power to alienate, and that after her death her share was to belong to the cousin. The widow sold this share, and a suit was brought by the cousin's heirs to recover the property more than 12 years after the sale, but less than 12 years after the widow's death. It was held that the terms of the

solenamah prohibited only an alienation in perpetuity, i.e., such an alienation by the widow as would prevent the cousin's succeeding after her death, but here the alienation was made only for the widow's lifetime and was perfectly good for her life-time, and as there was nothing in the words used in the *solenamah* attaching *forfeiture* to the alienation, Article 143 did not apply (but Art 141) and the suit was not barred—*Bibi Sahodra v. Rai Jang*, 8 Cal. 224 (229) (P.C.). Where a *najib-ul-arz* provided that if a resident left the village to settle elsewhere he would not be entitled to cultivation and possession, and a hereditary occupancy tenant went away from the village and settled in another place leaving his fields in charge of another person, *held* that the abandonment by the tenant of his residence in the village and his settling elsewhere involved a forfeiture of the tenure, and a suit by the proprietors of the village to resume possession of the land of the tenant must be brought within 12 years from the time when the forfeiture was incurred—*Dhian Sing v. Mehan Sing*, 180 P.R. 1883.

The starting point of limitation is the forfeiture itself, and not when the lessor comes to know of the forfeiture. There is nothing in this Article about the knowledge of the lessor. Ignorance would not prevent time running against the lessor—*Ayyaswami v. Manavikrama*, 58 M.L.J. 89, A.I.R. 1930 Mad 430 (433), 124 I.C. 273, *Zamrin of Calicut v. Samu Nair*, 38 M.L.J. 275, A.I.R. 1922 Mad. 29, 55 I.C. 380 (385), *Locha Ram v. Jhindwadda*, 76 P.L.R. 1917, 36 I.C. 565 (567). But in cases governed by the Transfer of Property Act, the lessor is not entitled to possession by reason of any forfeiture, unless he has given notice in writing to the lessee showing his intention to determine the lease, see sec. 111 (g), T. P. Act. Consequently time does not run until the lessor has given such notice.

608. Breach of condition—A lease provided that the lessee was to enjoy the land from generation to generation for purpose of residence without any power of alienation, and that in the event of such alienation the lessor would be entitled to khas possession. The lessee sold the land and the lessor sued to recover possession. *Held* that this Article applied, and time ran from the date of alienation and not from the date when the lessee surrendered possession to the transferee—*Motilal v. Chandra Kumar*, 24 C.W.N. 1064, 60 I.C. 312 (314).

Where it was stipulated in a lease that the tenant should clear a defined area in a certain time, on failure of which he would be liable to ejectment, the cause of action for a suit for ejectment accrued when the defendant did not clear the area by the time specified—*Tumeezooddeen v. Meer Surwar*, 7 W.R. 209. Where a lease granted for the reclamation of certain jungle lands provided that the lessee should hold the lands rent-free for six years, and that in the 7th year he should cause the lands to be measured and settlement of rent made with respect to the reclaimed lands, and that on failure to do so the lessor would be entitled to possession, a suit by the lessor to eject the lessee on breach of the above conditions was governed by this Article, and not by Art. 139—*Gooni Sheikh*

v *Mathewson*, 11 C.W.N. 661 (662). Although a suit by the landlord to recover possession from a tenant on the ground of breach of condition may be barred, still if the tenant does not in the written statement deny his tenancy under the plaintiff, and does not deny his liability to pay rent to the plaintiff, the landlord's suit to recover rent from the tenant is not barred—*Goohi v Mathewson*, 11 C.W.N. 661 (663).

If there are successive breaches, time runs from the date of the first breach. Unlike Art. 115, this Article does not provide for fresh causes of action by reason of successive breaches of condition. Thus, the purchasers of certain land agreed to pay the vendors certain fees annually in respect of such land, and further agreed that in default of payment the vendors should be entitled to the proprietary possession of a certain quantity of such land. The purchasers never paid the fees, and more than 12 years after the first default, the vendors sued them for possession of the land they were entitled to. It was held that the suit was governed by this Article, and as more than 12 years had expired from the first breach of such agreement, it was barred by limitation—*Bhojraj v. Gulshan*, 4 All 493 (496). Where a mortgagee is entitled to get the possession of land on the first instalment of the mortgage-money not being paid, a suit for possession of the land upon such non-payment falls under this Article and time runs from the date when that instalment ought to have been paid—*Nathu v Krishna*, 1876 P.J. 4

Where the parties to a deed of exchange expressly covenanted that in the event of any dispute arising in the matter of enjoyment of the property exchanged, each should return to the other what is taken, and the plaintiff was dispossessed of the lands given by the defendants, a suit based on the covenant is governed by this Article and not by Art. 113—*Srinivasa v. Johnsa Rowther*, 42 Mad. 690 (691)

A exchanged certain properties with B and obtained certain lands from B in exchange, and then C (a third party claiming a paramount title) brought a suit against A to recover the lands obtained by A in exchange from B, and got a decree. A then brought a suit against B to recover the lands got by B from A. Held that the suit was governed by this Article, as the deprivation of the property constituted a breach of the statutory condition under sec 119 of the Transfer of Property Act, and time ran from the date of the final appellate decree in the suit brought by C against A—*Rajagopalam v. Somasundara*, 30 Mad. 316 (318, 319).

144.—For possession Twelve When the possession of
of immoveable pro- years. the defendant be-
perty or any interest comes adverse to the
therein not hereby plaintiff.
otherwise specially
provided for.

609. Scope :—This is a residuary Article relating to suits for possession and is to be applied only when there is no other Article in the Schedule specially providing for the case; and if a suit be otherwise

specially provided for, the defendant's plea of adverse possession, for whatsoever length of time, is perfectly immaterial for the purpose of limitation—*Seshamma v. Chickaya*, 25 Mad 507 (510); *Mahammad Amanulla v. Badan Singh*, 17 Cal. 137 (143) P.C.; *Kannusami v. Muthusami*, 5 L.W. 250, *Sesha Naidu v. Periaswami*, 44 Mad. 951, *Pokhpal v. Bishan Singh*, 20 All. 155 (177).

This Article refers to suits "for possession" of immoveable property, that is, it applies to cases where the plaintiff is out of possession and seeks to recover possession. But where the plaintiff is already in possession and asks for a declaration of his right to possession, the suit does not fall under this Article but under Article 120—*Legge v. Rambaran*, 20 All 35 (F.B.). *Rajani v. Monaram* 53 I.C. 968, 23 C.W.N. 883. Similarly, Art. 144 does not apply where the suit is not to obtain actual possession but is for a declaration that the plaintiff is entitled to possession at some future date. The proper Article is Art. 120—*Krishnajee v. Annajee*, 54 Bom. 4, 31 Bom.L.R. 1240, A.I.R. 1930 Bom. 61 (63), 124 I.C. 773.

610. Art. 142 and Art. 144—Article 142 is restricted to suits which are in terms and substance based on plaintiff's prior possession which has been lost by dispossession or discontinuance. If there is no allegation of original possession in the plaintiff lost by dispossession or discontinuance of possession, Article 142 cannot apply but the suit falls under Article 144—*Vasudeo v. Eknath*, 35 Bom. 79 (90), *Fakir v. Babaji*, 14 Bom. 458 (461); *Ram Lakhan v. Gajadhar*, 33 All. 224 (228); *Bibi Sahodra v. Rai Jang Bahadur*, 8 Cal. 224 (229) (P.C.). *Subappa v. Venkappa*, 39 Bom. 335, 28 I.C. 24, *Govinda v. Md. Esoof Sahib*, 21 L.W. 398, A.I.R. 1925 Mad. 834, 87 I.C. 386, *Kunhi Moidin v. Pakkar*, 38 M.L.T. 137, A.I.R. 1927 Mad. 1004, 99 I.C. 971, *Sitaram v. Rajaram*, 48 I.C. 230 (Nag.), *Singaji v. Gambhirji*, A.I.R. 1925-Nag. 370, 87 I.C. 1023. Article 142 is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title, and the burden of proving the fact that the plaintiff was in possession and was dispossessed within 12 years before suit lies on the plaintiff, and on proving these facts the plaintiff is entitled to a decree unless the defendant establishes that he is the true owner of the property. But the Article applicable to a suit in which the plaintiff sues for possession of property on the basis of his title is Art. 144, and if in such a suit the plaintiff proves his title, he is entitled to a decree, unless the defendant succeeds in establishing his adverse possession for a period of more than 12 years—*Kanhaya v. Gurnar*, 51 All. 1042, 27 A.L.J. 1106, 119 I.C. 6, A.I.R. 1929 All. 753.

Where the plaintiff does not plead dispossession, and it is not found that he was actually dispossessed on a certain date, the suit falls under Article 144, and not under Article 142—*Ali Hammad v. Ghurpattar*, 47 All. 389, A.I.R. 1925 All. 454, 85 I.C. 578; *Ram Surat v. Badri*, 50 All. 89, A.I.R. 1927 All. 799 (800), 102 I.C. 874. Article 142 applies to a case where the plaintiff while in possession has been dispossessed or has discontinued possession while the plaintiff had never been in possession,

but the original owner was admittedly in possession up to the time of his death, and the plaintiffs derived their title from the will of the original owner and sought to recover possession on the strength of the will, Article 142 could not apply, but Article 144—*Charu Chandra v. Nahush Chandra*, 50 Cal. 49 (64), A I R. 1923 Cal. 1. Article 142 applies to a suit for recovery of possession after dispossession, and not Art. 144. Where the plaintiffs alleged that the suit lands formed part of their *paini* taluq, and that they were in possession of them up to some time when the lands diluviated, and when they reappeared and the plaintiffs went to exercise acts of possession over them they found the defendant in possession, held that the suit was for recovery of possession after dispossession, and that the proper Article applicable was Article 142 and not 144—*Birendra Nath v. Satish Chandra*, 44 C L J. 121, A.I.R. 1926 Cal. 1166, 97 I.C. 1003.

Art 144 is wider in scope than Art. 142; the latter refers to suits for immoveable property; the former includes in addition interest in immoveable property—*Lokenath v. Jahania Bibi*, 14 C.L.J., 572, 12 I.C. 305 (307).

In a case falling under Article 142, adverse possession is not required to be proved in order to maintain a defence, but in a case under Article 144, the defendant must show that his possession was adverse—*Md Amanulla v. Badan Singh*, 17 Cal 137 (143) (P.C.). What the plaintiff has to prove under Art 142 is that he was in possession within 12 years before suit, but under Article 144, the onus is on the defendant to prove that his possession has become adverse more than 12 years before the suit—*Ram Surat v. Badri*, 50 All 89, A.I.R 1927 All. 799 (800), 102 I C. 814.

611. Interest in immoveable property :—The following are interests in immoveable property.—

(1) An equity of redemption in a mortgaged property—*Casborne v. Scarfe*, 1 Atk. 603; *Parashram v. Govind*, 21 Bom 226; *Kanti Ram v. Katubuddin*, 22 Cal 33; *Umesh v. Zahur*, 18 Cal. 164.

(2) A *toda giras hak*, i.e. a right to receive an annual payment from a village—*Futfehsangi v. Desai*, 22 W R 178 (P.C.).

(3) An annuity granted by a Hindu sovereign to a Hindu temple—*Collector v. Krishnanath*, 5 Bom 322.

(4) A right to officiate as priest at funeral ceremonies to Hindus—*Raghoo v. Kassy*, 10 Cal. 73

(5) A right to take fruits of one's own trees—*Bapu v. Dhondi*, 16 Bom. 353.

(6) The right to an office in a temple and endowments attached thereto—*Alagirisami v. Sundareswara*, 21 Mad. 278 (287).

(7) A right to possession and management of a *saranjam*—*Narayan v. Vasudeo*, 15 Bom. 247.

(8) A Hindu widow's life-interest in the income of her husband's immoveable property—*Nathu v. Dhunbaji*, 23 Bom. 1.

(9) A right to collect dues from a fair on a piece of land—*Sikandar v. Bahadur*, 27 All. 462.

(10) A right to collect *lac* from trees—*Parmanandy v. Birkhu*, 5 N.L.R. 21, 1 I.C. 903.

(11) An exclusive right (*i.e.* excluding the owner) to catch fish in the tank of another is an interest in immoveable property and can be acquired by 12 years' enjoyment, but a right to catch fish not excluding the rightful owner, is not an interest in immoveable property but a *profit a prendre* and therefore an easement and can be acquired by 20 years' user—*Hill & Co v. Sheoraj*, 1 Pat. 674, 67 I.C. 954, *Luckimoni v. Koruna*, 3 C.L.R. 509, *Baker Hoscain v. Ranjit Koer*, 2 P.L.J. 289, 39 I.C. 777, *Lokenath v. Jahania Bibi*, 12 I.C. 303, 14 C.L.J. 572; *Silaram v. Petia*, 14 N.L.R. 25, 42 I.C. 392, *Parbutty v. Madho*, 3 Cal. 276.

(12) The right to *parjot*, *charai* and *charsai* dues—*Sheoraj v. Debi Baksh*, 21 O.C. 119, 46 I.C. 439.

(13) The mortgage of the "superstructure of a house exclusive of the land beneath" creates an interest in immoveable property, as the apparent intention is to mortgage the house and not merely the materials—*Narayan v. Ramaswamy*, 8 M.H.C.R. 100.

The following are not interests in immoveable property :—

(1) A right to be placed on the register of revenue records—*Bhikaji v. Pandu*, 19 Bom. 43.

(2) An agreement to grant a lease does not create an interest in immoveable property, nor is a suit upon the agreement a suit for the recovery of an interest in immoveable property—*Latta Ram v. Chaubain*, 22 W.R. 287.

(3) A claim to recover revenue from the holder of a land is not a claim to recover possession of an interest in immoveable property—*Alubi v. Kunhi*, 10 Mad. 115.

(4) A right to take water from the well of another is not an interest in immoveable property and cannot be lost by 12 years adverse possession—*Ananta v. Ganu*, 45 Bom. 80, A.I.R. 1921 Bom. 417.

(5) A right to worship an idol—*Eshan v. Monmohini*, 4 Cal. 683 (685).

(6) A suit to recover a certain sum of money due as an emolument of an hereditary office attached to a temple is not a suit to recover an interest in immoveable property—*Rathna Mudaliar v. Tiruvenkata*, 22 Mad. 351 (352).

612. Adverse possession :—The classical definition of adverse possession is to be found in the following oft-quoted words of Markby J : "By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having a right to immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the true owner is extinguished, and the person in possession becomes

the owner"—*Bejoy Chandra v. Kally Prosanno*, 4 Cal. 327 (329). [It should be noticed that there is a misprint in the report of the judgment at p. 329, the words "or on behalf" being omitted. See this passage correctly cited in 30 All. 119, at p. 122]. In order to constitute adverse possession, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him—*Secretary of State v. Krishnamoni*, 29 Cal. 518 (535) (P.C.). There must be proof of the defendant being in possession. Where the mortgagee was in actual possession of certain property under a usufructuary mortgage, and certain persons merely got their names recorded in the Revenue-papers in place of the name of the mortgagor, it was held that such persons could not acquire adverse possession of the right to redeem because they were not in actual possession of the property—*Kunwar Sen v. Darbari*, 38 All. 411 (414, 415). Entries in the record of rights of the defendant's name are not sufficient. The defendant must prove overt acts of adverse possession besides the entries—*Nur Muhammad v. Qaim*, 29 P.L.R. 381, 110 I.C. 857, A.I.R. 1928 Lah 306. Evidence of possession on paper (leases and documents of various kinds) is not sufficient—*Radhamoni v. Collector*, 27 Cal 943, 949 (P.C.). The doctrine of constructive possession cannot be applied in favour of a wrongdoer, whose possession must be confined to actual possession, that is to say, if he relies on adverse possession, he can succeed only as regards the portion of the land in suit of which he proves actual possession for the statutory period—*Nonab Bahadur v. Govinath*, 13 C.L.J. 625, 6 I.C. 392 (397); *Ananda Hari v. Secretary of State*, 3 C.L.J. 316; *Jogendra v. Baladeo*, 35 Cal. 961; *Mirza Shamsher v. Munshi Kunj Behari*, 12 C.W.N. 273

To prove title to the land by adverse possession, it is not sufficient to show that some acts of possession have been done. The possession required must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. Possession which does not cover the whole period and applies to small portions of the land is not sufficient—*Radhamoni v. Collector of Khulna*, 27 Cal 943 (950) (P.C.); *Jogendra v. Baladeo*, 35 Cal. 961 (971), *Jagwandas v. Bai Amba*, 25 Bom 362 (366), *Wali Ahmed v. Tota Meah*, 31 Cal. 397 (405); *Kuthali v. Kunharan-Katty*, 44 Mad. 883 (890) (P.C.), *Vithaldas v. Secretary of State*, 26 Bom. 410 (416). In other words, the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitations—*Jogendra v. Baladeo*, (supra); *Nonab Bahadur v. Gopinath*, 13 C.L.J. 625, 6 I.C. 392 (396); *Barjor Singh v. Sidh Nath*, 29 O.C. 395, 1 Luck. 441, A.I.R. 1927 Oudh 141, 98 I.C. 904. The possession, in order that it may bar the recovery, must be continuous and uninterrupted as well as open, notorious, actual, exclusive and adverse—*Armstrong v. Montil*, (1871) 14 Wallace 145; *Doswell v. Dela Lanza*, (1857) 20 Howard 32. An entry upon the land of the plaintiff, in order to be an assertion of hostile title, must be an entry as an owner. Entry on the land by persons who were *rai-yats* and who never claimed as owners, is not adverse possession—*Gaya Prasad v. Bakya Mani*, 56 Cal. 914, 33 C.W.N. 277 (279), A.I.R. 1929 Cal. 297, 119 I.C. 289

In order to constitute adverse possession, it must be a complete possession exclusive of the possession of any other person—per Cairns L. C. in *Lous v. Telford*, (1876) 1 A.C. 415 (423). Therefore, evidence of partial possession on the part of the plaintiff is sufficient to displace the adverse possession set up by the defendant—*Vithaldas v. Secretary of State*, 26 Bom. 410 (416). “To constitute dispossession, there must in every case be positive acts which can be referred only to the intention of obtaining exclusive control”—Pollock on Possession, p. 85. Therefore, promiscuous acts done at different times by an undefined and fluctuating body of persons from the village and the neighbouring villages cannot be said to be acts done with the intention of obtaining exclusive control over the lands, and do not amount to adverse possession—*Wali Ahmed v. Tota Meah*, 31 Cal. 397 (405); *Lutchmeeput v. Sadaulla*, 9 Cal. 698. Plaintiffs obtained leave to plant trees on land belonging to Government; and the only right they were entitled to was to get the fallen dry wood from the trees. Certain transfers of the village took place and on two occasions, once in 1900 and at another time in 1910, the defendant who purchased the village got the proceeds of the sale of such wood. The plaintiffs on both occasions asserted their claim to the wood or to the price thereof, but were unsuccessful. They then instituted this suit within six years of the last sale for a declaration of their right to get the dry wood. The defendant pleaded adverse possession. It was held that the right being one which was only *occasional*, that is, which could only be exercised at uncertain occasions when the wood might fall or be cut down from the trees, and not being uninterrupted or continuing every year or at stated times, and there being disputes between the parties as to the right on two previous occasions, it could not be said that the defendant had acquired a title by adverse possession—*Debi Prasad v. Badri Prasad*, 40 All 461 (466). No title by adverse possession can be presumed from a few acts of trespass committed only occasionally—*Kedarnath v. Amrit*, A I R. 1925 Pat 568, 88 I C 676.

It is sufficient to constitute adverse possession that the person claiming to be the real owner should have stood by, while others continued to possess, not by any derivative title but in practical contravention of his alleged rights. The law does not require that the claimant to ownership must in such circumstances have protested against the violation of his rights and that the possession went on despite such protest—*Aruna Chellam v. Venkatachalapathi*, 43 Mad 253 (269) (P.C.).

To constitute adverse possession, it is sufficient if there is an intention to hold the thing as owner; and if some overt act is done upon the thing in execution of that intention, it is not necessary that it should be enjoyed in any particular manner—*Sibasubramanya v. Secretary of State*, 9 Mad. 285 (303). Moreover, it is not necessary that some acts should always be done upon the spot in dispute itself, but it is enough if some overt acts of ownership were done in relation to that spot, as for instance, enclosing it—*Clark v. Elphinstone*, L.R. 6 App. Cas 164.

Acts indicative of adverse possession must vary according to the nature of the property over which possession is exercised. Thus, in case

of bil or waste lands, the cutting of grass and the grazing of cattle are the ordinary acts by which possession is asserted—*Wali Ahmed v. Tota Meah*, 31 Cal. 397 (405). In cases of forest lands the act of cutting wood, gathering forest produce and pasturing cattle, if such acts are accompanied with an assertion of the ownership of the soil, would be evidence of adverse possession—*Sivasubramanya v. Secretary of State*, 9 Mad. 285 (304). In case of a tank, the mere appropriation of the fish may not necessarily constitute adverse possession; but acts of an obviously proprietary character such as subletting, mortgaging, or re-excavation of the tank or the expenditure of large sums in clearing silt out of it, or the construction of masonry sluices in it, will constitute adverse possession—*Bijoy Chand Mahatab v. Iswar Chandra*, 21 C.W.N. 199, 35 I C 60 (63); *Venkatarama v. Secretary of State*, 33 Mad. 362, 20 M.L.J. 74.

If a bit of land which is of no use to the owner is used by a neighbouring landholder for various temporary purposes e.g. by building a privy, a hut, a shed for cows, goats etc., but all these structures are of a flimsy and temporary character, held that user of this sort is insufficient to give a title to the land by adverse possession. User of this sort is common in this country and excites no particular attention. It is not intended to denote nor understood as denoting a claim to the ownership of the land. So also, the acts of throwing rubbish on the land of another, or tethering cattle on a vacant site, and placing pieces of furniture, scaffolding, building materials, etc. on another's land are done in almost every part of this country, without any claim to ownership being thereby intended.—*Framji v. Goculdas*, 16 Bom. 338 (341, 342); *Rulia v. Nur Md.*, 27 P.L.R. 561, A.I.R. 1926 Lah. 615, 97 I C. 705; *Lajpat v. Sohna*, 30 P.L.R. 296, 115 I.C. 71, A.I.R. 1929 Lah. 432; *Kadar v. Shib Ram*, 27 P.L.R. 762, 98 I C. 880, A.I.R. 1926 J., 192. It would be beyond reason to hold that the mere erection of a few thatched structures or the planting of a few trees on the waste land of another is any proof of an intention to occupy the land adversely to the owner—*Bechu v. Lachmi*, 8 I C. 708 (709) (Oudh). The use of a small piece of plaintiff's vacant land by the defendant for the purposes of a back-yard would not be sufficient to constitute adverse possession, specially when the parties are brothers—*Chokkalinga v. Muthusami*, 21 Mad. 53 (55). The use of the plaintiff's abandoned waste land by the neighbours and the persons employed in the neighbouring mills as a convenient place for answering the calls of nature, does not constitute adverse user; indeed these acts are not acts of possession at all—*Jogendra v. Baladeo*, 35 Cal. 961 (971). In case of waste land, jungle land or tank land the defendant does not necessarily dispossess the owner by planting trees or by cultivation, as he does not by walking over or otherwise trespassing on it. To dispossess the owner, he must assert clearly that he claims the right to hold possession as owner—*Sheo Narain v. Badal*, 8 O C 177. The mere fact that the defendants had been in possession of the suit land in the sense that they had been enjoying it because it lay in front of their houses, would not be sufficient to make their enjoyment adverse. They must show that they asserted their right to hold possession

as owners—*Hulas v. Barkatunnissa*, 1 Luck. 469, A.I.R. 1926 Oudh 393, 3 O.W.N. 475, 94 I.C. 1034. So also, the enjoyment of a *kalam perambole* for the purpose of using it as a threshing floor, or for storing manure and green leaves, for stocking hay-stocks after the harvest, for drying paddy before they are taken to the granary, for allowing buffaloes and other cattle to stray and remain there before they are taken for grazing, was held to be an enjoyment of too fugitive and patently permissive kind to amount to adverse possession. There is probably no village in India in which unoccupied village land is not used for the above purposes. Such user does not harm any one and is not objected to by any one—*Dindigul Taluk Board v. Venkatarama*, 46 Mad. 866, A.I.R. 1924 Mad 197, 75 I.C. 38

Possession of a portion of the land only cannot be held to constitute constructive possession of the whole, so as to enable the possessor to obtain thereby a title to the whole by limitation—*Wali Ahmed v. Tota Meah*, 31 Cal 397 (405), *Navab Bahadur v. Gopinath*, 13 C.L.J. 625, 6 I.C. 392 (397); *Mohini Mohan v. Promada Nath*, 24 Cal. 256. The doctrine that possession of part is in law possession of the whole does not hold good in the case of a trespasser, if the whole is otherwise vacant. Possession by a trespasser is confined to the land actually occupied by him—*Syed Sadik v. Etizad*, 13 O.L.J. 798, A.I.R. 1927 Oudh 209, 101 I.C. 714; *Maheshwar v. Partap Bahadur*, 12 O.C. 58, 2 I.C. 63. It is impossible to obtain by prescription anything more than is claimed. If a man asserts that he is the owner of an undivided half share in property and holds possession of it for 12 years, he becomes owner of that half share only, not of the whole property—*Chunnu v. Subhetti*, 22 N.L.R. 181, 98 I.C. 540, A.I.R. 1927 Nag. 67. But in many cases acts done upon parts of a tract of land may be evidence of the possession of the whole; as for instance, if a large field is surrounded by hedges, acts done in one part of it would be evidence of the possession of the whole—*Clark v. Elphinstone*, L.R. 6 App. Cas. 164. When a tract of land with a defined boundary has been throughout claimed as owner, and acts of ownership have been done upon various portions of it, such acts of enjoyment may be accepted as evidence of the possession of the whole—*Sibasubramanya v. Secretary of State*, 9 Mad. 285 (305). Where there are circumstances to link together various portions of ground, the possession of a part amounts constructively to adverse possession of the whole—*Suresh Chandra v. Shili Kanta*, 51 Cal. 669 (679), 28 C.W.N. 637, A.I.R. 1924 Cal. 855, 78 I.C. 679.

Where lands are held as remuneration for services, the mere non-performance of the services is not sufficient to make the holding adverse to the landlord, just as non-payment of rent by a tenant to his landlord does not constitute his possession adverse to the landlord. To make the holding adverse, there must be, over and above the omission to render service, an active assertion of an adverse right on the part of the defendant by a refusal to perform the service or a claim to hold the land free of such service—*Komargowda v. Bhimaji*, 23 Bom. 602 (606, 607).

So long as a person is in permissive occupation of land, his posses-

sion does not become adverse; it commences to be adverse at the end of the period during which he is permitted to occupy the land—*Shivrudrappa v. Balappa*, 23 Bom. 283 (286); see also *Gobinda Lal v. Debendra Nath*, 6 Cal. 311 (314); *Ahmad Sharif v. Umrao*, 3 O.W.N. 460, A.I.R. 1926 Oudh 353, 94 I.C. 779. Permissive occupation or occupation held under a license cannot be said to be adverse. Where two companies owned two adjoining pieces of land and employed a common agent, who with the best of motives permitted the defendant company to build upon the land belonging to the plaintiff company, held that the defendant company were mere licensees, or their occupation was at the most permissive (viz. by the common agent), and that they could not put forward a plea of adverse possession—*Gujarat Ginning Co. v. Motilal Spinning Co.*, 53 Bom. 792, 123 I.C. 481, A.I.R. 1930 Bom. 84 (86). Where the plaintiff's husband conveyed to her two houses in satisfaction of her dower, and continued to reside in one of the two houses as before, such residence must be treated as permissive on behalf of the plaintiff, and was not adverse to her right over the property—*Ibrahim v. Isa Rasul*, 41 Bom. 5 (12). Where possession of portion of the land is shown to be permissive and not adverse, courts may presume that the possession of the rest of the properties was also permissive, in the absence of evidence to the contrary—*Ram Abhilak v. Chaurast*, 13 O.L.J. 839, 101 I.C. 730, A.I.R. 1927 Oudh 582.

A person who holds possession on behalf of another does not by a mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Thus, a wife who holds possession on her husband's behalf, during his absence, cannot acquire a title by adverse possession against her husband, however long her husband may be absent—*Bijoy Chandra v. Kally Prosanna*, 4 Cal. 327 (329). A licensee (whose possession is only permissive) cannot claim title only from possession, however long, unless it is proved that his possession was adverse to that of the licensor to his knowledge and with his acquiescence—*Kodoth Ambu Nayar v. Secretary of State*, 47 Mad. 572 (582) (P.C.), 80 I.C. 835, A.I.R. 1924 P.C. 150.

Possession does not become adverse when the intention to hold adversely is wanting. Although the defendant's possession might have been wrongful, still if the plaintiff honestly though wrongly believed that the defendant (who was a Hindu female) was entitled to possession for life and the defendant herself shared that belief and so remained in possession, such possession was not adverse to the plaintiff, but merely permissive, as the intention to hold adversely in order to obtain an absolute estate was wanting—*Prisab v. Gurappa*, 38 Bom. 227 (236), 24 I.C. 716.

Another important principle to be borne in mind is that the possession of the defendant does not become adverse to the plaintiff, until the plaintiff is entitled to immediate possession. As observed by Mr Justice Markby: "By adverse possession I understand to be meant possession by a person holding the land on his own behalf, or on behalf of some person, other than the true owner, the true owner having a right to

immediate possession"—*Bejoy Chunder v. Kally Prosanno*, 4 Cal. 327 (329). This well-known rule is conveyed in the maxim "*contra non valentem agere non currit prescriptio*," i.e., prescription does not run against a man during the time when he is not entitled to immediate possession—*Tarubai v. Venkatrao*, 27 Bom. 43 (51); *Malkarjun v. Amrita*, 42 Bom. 714 (718), 47 I C. 153; *Chinto v. Janki*, 18 Bom. 51 (57).

The possession of the defendant does not become adverse to the plaintiff where there was no notice or knowledge or circumstance that could have given notice or knowledge to the plaintiff that the defendant's possession was in displacement of his right. Until the plaintiff had reasons to know that his rights were invaded, there could be no necessity for him to take action. Knowledge on the part of the person whose rights are invaded is an essential element of adverse possession—*Tarubai v. Venkatrao*, 27 Bom. 43 (69). Possession, of which the plaintiff was not aware until a recent date, is not adverse possession—*Gaya Prasad v. Bakya Nani*, 56 Cal. 914, 33 C.W.N. 277 (279). But actual knowledge is not necessary. Knowledge may be presumed from an open and notorious act of taking possession—*Tarubai v. Venkatrao*, 27 Bom. 43 (52), U. N. Mitra's Limitation, p. 135, Angell on Limitation, p. 292.

Possession, in order to be adverse, must have been used openly and without any effort made or step taken to effect concealment—*Rains v. Buxton*, (1880) 14 Ch D 533 (540). The possession taken must not be clandestine. The possession, in order to ripen into a prescriptive title must be juridical and have none of the *vitia possessionis* as *claim vi aut precario*. And if in its inception it is vitiated by its clandestine, violent or permissive character, it must lose that character and become open, peaceable and as of right before it can cause time to run—*Tarubai v. Venkatrao*, 27 Bom. 43 (53).

Possession is never considered adverse if its commencement can be referred to a lawful title—*Doe v. Brightwen*, (1809) 10 East 583; *Thomas v. Thomas*, (1856) 2 K & J 79, *Bhairabendra v. Rajendra*, 50 Cal. 487 (489), A I R 1924 Cal. 45, 74 I C 193. The possession of a manager of a family or guardian does not become adverse until he has distinctly repudiated the management or guardianship—*Nabab Mir Sayad v. Yasin Khan*, 17 Bom. 755 (758). One who holds possession on behalf of another cannot, by a mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of Limitation—*Bejoy Chunder v. Kally Prosanno*, 4 Cal. 327 (329). There must be some adverse act, so that if the possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse—*Dadoba v. Krishna*, 7 Bom. 34 (39). That is to say, if there be no adverse act, nothing overt and no unmistakable ouster, or taking of possession, and all that is done is referable to or consistent with and susceptible of explanation by, some title which does not impugn but recognise the right of the person seeking to recover possession, there can be no possession adverse so that person without notice or intimation to him of some kind, that an

adverse claim has been set up in opposition to his right theretofore recognised—*Tarubai v. Venkatrao*, 27 Bom. 43 (53); *Ittappan v. Manavikraman*, 21 Mad. 153 (159). A person who is once in possession in a fiduciary character does not cease to hold in that character merely because it becomes uncertain who is the actual person to whom he has to account—*Lyell v. Kennedy*, 14 App. Cas. 437.

Where a decree has been made declaring a right to and directing partition, but no proceedings have been taken in execution of the decree, and the parties have remained in *status quo* without any partition having been made, neither party can claim against the other to have been in adverse possession of any portion of the property—*Nasratullah v. Mujibullah*, 13 All. 309 (315).

Adverse possession and easement distinguished:—If a person stands in such relation to a particular thing that he has in fact dominion over it, and if he and those under whom he claims have in fact exercised this dominion from time immemorial or for the period fixed by the law of prescription, he becomes the legal owner of the thing; but in order that the possession may generate ownership, it is necessary that the possessor should hold the thing *exclusively*, and *for himself as owner*. In other words, to constitute adverse possession two things are necessary, *viz*, the physical fact of exclusive possession, and the intention to hold for himself as owner. If, on the other hand, a particular act is done upon a thing with the belief that another is its owner and not with the intention to hold as owner, and if the particular act has been done continuously for 20 years as fixed by the law of prescription, the person doing the act acquires a legal right to do that act, though the thing upon which it is done is in other respects under another's dominion. In principle, the act done is one of ownership or evidence of easement according as the person doing it asserts general ownership or a particular right in another's property, and in the first case the act of enjoyment is designated possession and in the latter case quasi-possession. This is the distinction in principle between acts of ownership and acts which are done in the exercise of easements—*Sivasubramanya v. Secretary of State*, 9 Mad. 285 (302, 303).

613. Adverse possession by tenant against landlord:—There can be no adverse possession by the tenant during the term of his lease. A person who lawfully came into possession of the land as tenant from year to year or for a term of years, cannot, by setting up during the continuance of such relation any title adverse to that of the landlord, acquire by operation of the law of limitation any title as owner or any other title inconsistent with that under which he was let into possession. But the tenant can, after the determination of the tenancy, set up and acquire by prescription, against the landlord, a right as owner or such limited estate as he might prescribe for—*Seshamma v. Chickaya*, 25 Mad. 507 (511). A person coming into possession under a lease which is *invalid* or *void* as against the person seeking to eject him is really a trespasser, and as such, after the expiration of the period

prescribed by Article 144 acquires by prescription the limited right under the lease, whether it be a lease for a term of years or a lease in perpetuity—*Seshamma v. Chickaya*, 25 Mad. 507 (511, 512); *Budesab v. Hanmanta*, 21 Bom. 509; *Thakore Fatesinghji v. Bamanji*, 27 Bom. 515 (537).

"A tenant's possession, unlike that of a stranger, is in its inception in subserviency to and consistent with the landlord's title, and as during the existence of the tenancy the tenant is bound to protect the interest of the landlord, the landlord has a right to act upon the supposition that his interest has not been betrayed and that no change in the character of the possession has taken place, unless and until it is brought home to him that the contrary is the case. Therefore, though the law does not absolutely disable a tenant from disclaiming his landlord's title and claiming to hold in his own right, yet if he does so, the statute does not begin to operate unless the possession before consistent with the title of the real owner becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued and notorious so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the owner (See *Zeller v Eckhart*, 4 How (U S) 289 at p. 290, cited in Angell on Limitation, 6th Edn p 458). It should be added, however, that if the disavowal of the landlord's title and the assertion of the claim to hold on the tenant's own account take place during the currency of a definite term then the tenant's possession does not necessarily become adverse immediately. For in such a case the term would become forfeited only if the landlord does some act showing his intention, on the ground of the denial of his title, to determine the tenancy. In the absence of such act, the term subsists, and the possession is, in law possession under the lease. But the moment the term comes to its natural termination by efflux of time, the disloyal tenant's possession becomes adverse"—per Subramania Aiyer J in *Ittappan v Manavikraman*, 21 Mad 153 (163). Where the term of a lease is continuing, mere non-payment of rent without anything more would not amount to adverse possession. But where a lease is for a fixed period, and there is no proof that a fresh tenancy was constituted at the end of the period, then the lease may be taken to have determined on that date, and the possession of the tenant thenceforward becomes wrongful—*Shravan v. Fattu* 28 Bom LR 1357, AIR 1927 Bom. 613, 98 IC. 911. See Note 583 under Article 139.

The possession of a tenant for life cannot become adverse within the meaning of the Limitation Act by a mere notice from him that he was holding on a perpetual or hereditary tenure—*Beni Pershad v Dudh Nath*, 27 Cal 156 (PC). A tenant for life cannot prescribe against his landlord during his life-time, consequently, a transferee from a tenant for life cannot prescribe against his landlord during the life-time of such tenant—*Chola Nagpur Banking Association v. Kamakhya*, 7 Pat. 341, 109 IC. 306, AIR. 1928 Pat. 431 (434).

Where the parties are landlord and tenant, the acts, which are relied on as evidence of adverse possession must be such that they were

inconsistent with the purpose to which the landlord intended to devote the land. The acts of the tenant must be such that they amount to an assertion of possession adverse to the landlord, and not acts which were presumably done with his permission or consent. Thus, in the case of *bil* or waste lands, the cutting of grass and grazing of cattle would be ordinary acts by which possession would be asserted; but if these acts are being done by tenants on the waste lands of their landlord, they cannot be held to amount to adverse possession because these acts are such as would ordinarily be done on the waste lands of the landlord without any objection being raised and are in fact acts presumably done with his permission—*Wali Ahmed v. Tota Meah*, 31 Cal. 397 (405). The principle is, that acts of user committed upon land which are not inconsistent with the owner's enjoyment of the soil for the purpose for which the owner intends to use it, do not amount to adverse possession—*Leigh v. Jack*, (1879) L R 5 Ex. D 264 (273).

Persons who claim to be tenants of service watan lands cannot acquire any title to a permanent tenancy in the lands by setting up 12 years' adverse possession as against the watandars from whom they held the lands—*Madhavrao v. Raghunath*, 47 Bom. 798 (809) (P.C.), 25 Bom L R 1005, 74 I C 362, A I R 1923 P C. 205.

Mere non-payment of rent by a tenant does not establish adverse possession on the part of the tenant. While there subsists any contract express or implied between the parties in and out of possession, to which possession may be referred as legal and proper, it cannot be pronounced adverse. As the possession may be referred to the contract of tenancy under which the tenant entered, mere length of enjoyment without payment of rent does not under ordinary circumstances affect the relation of the parties—*Dadoba v. Krishna*, 7 Bom. 34 (39), following *Doe Dem Colclough v. Hulse*, 3 B. & Cr. 757, *Tatia v. Sadashiv*, 7 Bom. 40 (42), *Gangabai v. Kalapa*, 9 Bom 419 (421), *Jugdeo v. Baldeo*, 2 Pat. 38 (52) (P C), A I R 1922 P.C. 272, 3 P L T 605, 27 C.W.N 925, 71 I C 984, *Paresh Narain v. Kassi Chunder*, 4 Cal. 661 (663), *Prasanna v. Srikantha*, 40 Cal. 173 (180), *Rungo Lal v. Abdul Gaffoor*, 4 Cal. 314 (318), *Prem Singh v. Bhupia*, 2 All 517, *Madan Mohan v. Rameshwar Malia*, 7 C L J 615, *Tiru Churna v. Sanguvien*, 3 Mad. 118. But each case must be decided on its own particular features. Where rent was never paid at all for nearly 30 years and no serious attempt was ever made to recover rent, and over and above this there is the denial on oath by the defendant that he ever intended to pay rent or regarded himself as lessee, the defendant's possession must be treated as adverse—*Umar Baksh v. Baldeo Singh*, 97 P R 1915, 32 I.C. 35.

If a tenant (other than a tenant for a fixed term) instead of paying rent to the landlord pays it to a third party who claims against the landlord, the possession of the third party will be adverse to the landlord, provided he has knowledge of the facts—*Itappan v. Manavikrama*, 21 Mad 153 (164); *Gossain Mahendra v. Rajani Kant*, 1 C.W.N. 246 (247); *Tarubai v. Venkatrao*, 27 Bom. 43 (57). See also Note 621A under heading "Adverse possession of limited interest" *infra*.

Adverse possession by third party against landlord :—"The possession of a trespasser does not become adverse to the lessor, until the latter acquires a right to the *khas* possession of the demised premises. To hold that 12 years' possession by a trespasser of the whole or part of the demised premises would bar the right of the lessor, although the lessee does not renounce his character as such and the lease is still subsisting, is to violate the maxim that 'prescription does not run against a person who is unable to act.' The general principle of the law is to bar a person who has a right to enter if he does not exercise that right in a certain time, not to bar those who cannot exercise that right"—Mitra's Law of Limitation, 3rd Edn, p 145 Therefore possession taken by a trespasser during the currency of an *ijara* lease does not become adverse to the Zemindar (lessor) until the latter is entitled to possession, *i e*, until upon the expiration of the lease, and a suit for possession may be brought within 12 years from the date of the termination of the lease. The principle is, that possession which is adverse to the *ijardar* does not become adverse to the Zemindar until he is entitled to possession—*Sharat Shundari v. Bhobo Pershad*, 13 Cal 101 (103), *Krishna Govind v. Hari Churn*, 9 Cal 367 (370); *Sheo Sahye v. Luchmessur*, 10 Cal. 577 (580); *Kishwar v. Kali*, 10 C.W.N. 343, *Bissesuri v. Baroda*, 10 Cal. 1076 (1079), *Thamman v. Maharaja of Vizianagram*, 29 All 593 (595), *Gunga Kumar v. Asutosh*, 23 Cal. 863 (866) But during the lease the Zemindar may bring a suit under section 42 of the Specific Relief Act, for a declaration of his title as against the trespasser—*Bissesuri v. Baroda*, 10 Cal 1076 (1078) The Calcutta High Court has laid down in another case that in a case of a *patni* or other permanent tenure, if the Zemindar finds that the *patnidar* or other permanent tenant has allowed a trespasser to hold adverse possession of any land included in the permanent tenure for more than twelve years, such adverse possession would be adverse to the Zemindar also, and if the *patnidar* then relinquishes the *patni* in favour of the Zemindar, the Zemindar's suit to recover possession from the trespasser would be barred, because time ran not from the date of relinquishment but from the date of the trespasser's possession—*Gobinda v. Surjakant*, 26 Cal 460 (465) In other words, the Calcutta High Court has laid down in this case that possession taken by a trespasser during the term of the lease becomes adverse to the zamindar also. The same view has also been taken in *Prosonnomoyi v. Kali Das*, 9 C.L.R. 347 These rulings are in conflict with the other rulings of the Calcutta High Court (9 Cal 367, 10 Cal 577, 13 Cal. 101, 23 Cal 863) cited above.

613A. Encroachment by tenant :—As regards encroachment by tenant on the lands of his *landlord*, see Note 597 under Article 142

If a tenant during his tenancy encroaches upon the land of a *third person* and if it is proved that he encroached upon that land adversely to his landlord also, then adverse possession of the land for 12 years will give the tenant a title by limitation But if the tenant encroaches upon the land of a third person, and holds it with his own tenure, as,

part of his tenure, (i.e., not adversely to his landlord, but expressly or impliedly with the acquiescence of the landlord), he is considered to have made the encroachment, not for his own benefit but for that of his landlord, and if he has acquired a title against the third person by an adverse possession, he has acquired it for his landlord and not for himself, so that upon the termination of the tenancy, he must give it up to his landlord—*Nuddyar Chand v. Meajan*, 10 Cal. 820 (821). In other words, the tenant 'steals for his landlord.'

614. Adverse possession by mortgagee:—The possession by the mortgagee of the mortgaged property is not *prima facie* adverse to the mortgagor, even the fact that the mortgagee is in possession after the mortgage-debt is paid off, does not make such possession adverse to the mortgagor—*Harasit v. Jaladhar*, 56 Cal. 1130, 33 C.W.N. 963 (965), A.I.R. 1930 Cal. 15, 121 I.C. 407. The mere assertion of an adverse title by a mortgagee in possession does not make his possession adverse to the mortgagor or enable him (mortgagee) to abbreviate the period of 60 years which the law allows to a mortgagor for redemption—*Ali Muhammad v. Lalta Baksh*, 1 All. 655 (658); *Massad v. Collector*, 10 Mad. 189 (191), *Bhagnant v. Kondi*, 14 Bom. 279; *Pandu v. Anpurna*, 21 Bom. 793 (796), *Ittappan v. Manavikrama*, 21 Mad. 153 (164); his possession can become adverse only after the expiry of the term of the mortgage—*Matadin v. Ahmad Ali*, 34 All. 213 (223) (P.C.) This is in accordance with the principle laid down in *Bejoy Chandra v. Kally Prosonno*, 4 Cal. 327 (329) that possession does not become adverse to the true owner until he is entitled to immediate possession. The Privy Council has laid down that as between the mortgagor and the mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar or defence to a suit for redemption if the mortgagor is otherwise entitled to redeem—*Khizarjmal v. Daim*, 32 Cal. 296 (P.C.); *Mahendra v. Chandrapal*, 24 O.C. 155, 63 I.C. 284 (285); *Jiwan Singh v. Ghasita*, 27 P.L.R. 402, 95 I.C. 9, A.I.R. 1926 Lah. 549; *Dinanath v. Rama Rai*, 6 Pat. 102, 97 I.C. 348, A.I.R. 1926 Pat. 512, *Achche Mirza v. Ahmad*, 1 Luck. 529, A.I.R. 1926 Oudh 594, 97 I.C. 922. A person who lawfully comes into possession as mortgagee cannot, by setting up during the continuance of such relation any title adverse to that of the mortgagor inconsistent with the real legal relation between them, and that however notoriously and to the knowledge of the other party, acquire by the operation of the law of adverse possession a title as owner or any other title inconsistent with that under which he was let into possession—*Bakha Singh v. Ram Narain*, 47 All. 73, 22 A.L.J. 905, A.I.R. 1925 All. 133, 80 I.C. 935.

When a mortgagee in possession under a usufructuary mortgage holds over after the time limited in the mortgage-deed for surrender of the property, his possession does not, by that fact alone, become adverse to the mortgagor, who still has a period of sixty years within which to sue for recovery of possession—*Pokhpal v. Bishan*, 20 All. 115 (117). But a

usufructuary mortgagee remaining in possession after satisfaction of the mortgage by redemption is a trespasser, and if he continues in such possession for the statutory period, the right of the mortgagor to recover possession becomes barred—*Ram Kuer v. Govind Ram*, 48 All. 145, 92 I.C. 414, A.I.R. 1926 All. 62

Where a mortgagee pays only a part of the consideration and is in possession of the whole of the mortgaged property, he cannot by the mere assertion of a larger interest than what was validly passed to him under the mortgage, acquire a title by 12 years' possession. The mortgage is valid to the extent of the amount actually advanced, and the mortgagee's possession of the property is not adverse to the mortgagor. The latter can redeem it within sixty years under Article 148—*Rajai Tirumal v. Pandla Muthial*, 35 Mad 114 (119)

But it would be going too far to say that in no possible case can a mortgagee set up an adverse title to the mortgaged property. A mortgagee can set up adverse possession if his possession at its inception was that of a trespasser—*Jina Khan v. Lakshmi Chand*, 232 P.L.R. 1911, 11 I.C. 429. Thus, a mortgagee who obtains possession of the mortgaged property where the mortgage-deed does not confer on him a right to possession of the property is a trespasser, and his possession is adverse to the mortgagor—*Jowahar v. Amarchand*, 27 P.L.R. 235, A.I.R. 1926 J. 125, 93 I.C. 934. Where a mortgagee obtained an unregistered sale of the equity of redemption (which was invalid under sec. 54 T.P. Act) and thereafter held possession of the property for more than 12 years, held that the unregistered sale-deed, though inadmissible to prove the passing of the title to the vendor, was admissible for the purpose of determining the nature of the possession taken by the vendee (mortgagee). The deed of sale did not create any title in favour of the mortgagee, leaving him in the position of a trespasser, and as his possessor extended for over a period of 12 years, he became full owner of the land—*Qadar Baksh v. Mangha Mal*, 4 Lah 249 (251), 73 I.C. 889, A.I.R. 1923 Lah 495, *Mahendra v. Chandrapal*, 24 O.C. 155, 63 I.C. 284 (285). *Sheo Nath v. Tulsipat*, 12 O.L.J. 139, A.I.R. 1925 Oudh 385, 87 I.C. 188. So also, where a mortgagor surrendered his equity of redemption to the mortgagee, but there was no registered deed, the possession of the mortgagee thereafter for more than 12 years perfected his title to the property—*Bashir Hussein v. Chandrapal*, 25 O.C. 83, A.I.R. 1922 Oudh 133, 68 I.C. 223. Where a mortgagee, in spite of the foreclosure proceedings under Reg. XVII of 1806 being defective, enters into possession, he holds as a trespasser, and if he so holds for 12 years, the mortgagor's right of redemption is barred—*Luchi v. Jagannath*, 26 A.L.J. 149, A.I.R. 1928 All. 197 (198), following *Bhola v. Ajudhia*, 1882 A.W.N. 84. Where a mortgage of a certain property was executed by persons other than the real owner, who however was aware of the mortgage and acquiesced in it, the mortgagee's possession became adverse to the real owner from the date of the mortgage, and the persons who executed the mortgage were entitled to redeem to the exclusion of the true owner—*Pursottam v. Sagaji*, 28 Bom 87 (91, 92). A mortgagee remaining in possession of

the mortgaged property for more than 12 years in full ownership in satisfaction of the mortgage-debt, under an oral sale from the mortgagor, acquires an absolute title to the property, and the mortgagor's right to redeem is extinguished—*Kandasami v. Chinnabha*, 44 Mad. 253 (257) (dissenting from *Ariyaputhira v. Muthukumaraswamy*, 37 Mad 423). The parties to a mortgage by conditional sale entered into an agreement whereby the mortgagor gave up all his equity of redemption in the property mortgaged. The agreement was not registered, but both parties consented to the complete transfer of the equity of redemption, and both parties acted on the agreement for nearly 40 years. On a suit being brought by the mortgagor for redemption, held that the mortgagees had been in adverse possession for more than 12 years, and the suit was barred—*Khadu v. Sheo Parson*, 39 All. 423 (426), 17 A.L.J. 366. Although a mortgagee cannot, by a mere assertion of his own or by any unilateral act of his, convert his possession as mortgagee into possession as absolute owner, still if a mortgage-deed provides that in default of payment of the mortgage amount within the stipulated period the mortgagee should take possession of the property and enjoy the same as absolute owner, and the mortgage-money is not paid within the stipulated period, the possession of the mortgagee thereafter for over 12 years becomes adverse to the mortgagor, whose right to redeem is consequently barred—*Usman v. Dasanna*, 37 Mad 545 (547), 23 M.L.J. 360, 16 I.C. 694. If a mortgagee takes possession as mortgagee, and thereafter the equity of redemption is sold to him by the mortgagor himself, but the sale is invalid, the mortgagee cannot by merely asserting to hold as absolute owner under such purchase, change the original character of his possession as mortgagee; but if in a litigation between the parties it is decided that the mortgagee is entitled to possession not on the strength of his title as mortgagee but on the strength of his title as purchaser, his possession becomes adverse from the date of the sale—*Ahmed v. Babu Devji*, 53 Bom 676, 31 Bom.L.R. 778, A.I.R. 1930 Bom 135 (139), 122 I.C. 113.

615. Adverse possession by co-mortgagor.—Where property has been mortgaged by several co-sharers and one of them redeems it, the possession of the redeeming co-sharer does not become adverse to the other co-sharers, until there is an assertion of an exclusive title and submission to the right thus set up. The principle is, that as long as a possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that right rather than to a right which contradicts the ownership—*Ram Chandra v. Sadashiv*, 11 Bom. 422 (424), *Bhauddin v. Sheikh Ismail*, 11 Bom. 425 (428); *Faki Abas v. Faki Nuruddin*, 16 Bom. 191 (196); *Chandbhai v. Hasanbhai*, 46 Bom. 213 (215), A.I.R. 1922 Bom. 150, 64 I.C. 205; *Moidin v. Oothumanganni*, 11 Mad. 416; *Waqiuddin v. Ahmad*, 2 Luck 618, A.I.R. 1927 Oudh 347 (350), 104 I.C. 400.

Even if the co-mortgagor, after redeeming the property, re-mortgages it to a third party, this in itself would not amount to adverse possession

as against the other co-mortgagors—*Moidin v. Oothumanganni*, 11 Mad. 416 (417); *Ram Chandra v. Sadashiv*, 11 Bom 422. If a co-mortgagor, after redeeming the entire mortgage, gets the mutation of names in his favour on the basis of his possession, he cannot be subsequently allowed to say that merely by virtue of the said act he set up an exclusive title to himself and denied the title of his co-sharers. Unless he can prove that in the mutation proceedings he denied the title of his other co-sharers to their knowledge and remained thereafter in exclusive possession for more than twelve years, his adverse possession cannot be considered to have been made out—*Wajuhuddin v. Ahmad*, supra.

But if the mortgage is a usufructuary one, and the amount is satisfied out of the usufruct, one co-mortgagor cannot take possession of the entire property from the mortgagee but is entitled to recover only his individual share. If however, he takes possession of the entire property, he is then deemed to hold the shares of the other co-mortgagors adversely to them—*Gobardhan v. Sujan*, 16 All. 254 (256) *Inayat Hussein v. Ali Hussein*, 20 All 182 (184). But if the usufructuary mortgage is redeemed by one co-mortgagor by paying the money out of his own pocket, and is not redeemed out of the usufruct, the redeeming co-mortgagor can retain possession of the property as a lienor until he is paid the shares of the money payable by the other co-sharers and such possession is not adverse to them—*Ramchandra v. Sadashiv*, 11 Bom 422 (424).

616. Adverse possession by third party against mortgagee or mortgagor—Possession of mortgaged property obtained by a third party by ouster of the mortgagee in possession is not necessarily adverse to the mortgagor also, since the latter is not entitled to immediate possession during the existence of the mortgage, the possession can become adverse against the mortgagor only after he has become entitled to possession after satisfaction of the mortgage—*Muhammad Husain v. Nutti Chand*, 27 All 395 (396); *Chinto v. Janki*, 18 Bom 51 (58), *Ismdar Khan v. Ahmad Husain*, 30 All 119 (122), *Ittappan v. Manavikrama*, 21 Mad 153 (164), *Shambhu v. Nama*, 35 Bom 438 (442), *Tarabai v. Dattaram*, 49 Bom 539, A I R 1925 Bom 465, 87 I C 765. In such a case, a suit for possession by the mortgagor or those claiming under him will not be barred, although one by the mortgagee may be—*Chinto v. Janki*, 18 Bom 51 (56). The mortgagor, having once put the mortgagee in possession, ordinarily has no right to possession himself until the mortgage is paid off. The mere fact of the mortgagee's letting the property go out of his possession cannot give the mortgagor such a right before payment. And the party in possession though he may be a trespasser, would ordinarily be able to defend an action of ejectment at the suit of the mortgagor by setting up *jus tertii*—*Chinto v. Janki*, 18 Bom 51 (58). See also *Kunwar Sen v. Darbari*, 38 All 411 (415). If the true owner (mortgagor) has no right to immediate possession, it is practically immaterial to him who is in possession. Having no right to possession himself, he cannot eject the person in possession—*Tarabai v. Venkatrao*, 27 Bom. 43 (51). If the trespasser pleads adverse possession both against the mortgagor and the mortgagee, the burden lies upon

(F.B.). The possession of a person claiming to hold property adversely to the mortgagor does not become adverse to the mortgagee, who has purchased the property at a sale in execution of a decree on his mortgage, until after the sale, when the ownership in and the beneficial title to the land for the first time vests in him—*Aimadar v. Makhan*, 33 Cal. 1015 (1019); following *Pugh v. Heath*, (1882) 7 App. Cas. 235.

If however, the adverse possession of a trespasser begins *before* the execution of the simple mortgage, it will run against the mortgagor and mortgagee both—*Nandan v. Jumman*, 34 All. 640 (645); *Parthasarathy v. Lakshmana*, 35 Mad. 231; *Nallamathu v. Betha Naicken*, 23 Mad. 37 (39); *Tornton v. France*, [1897] 2 Q.B. 143. The term 'adverse possession' clearly implies that the person against whom adverse possession is exercised is a person who is entitled to demand possession at the moment the adverse possession begins. Where such a person has the entire interest when the adverse possession begins, he cannot, by afterwards transferring a part of the interest by mortgage, prevent the operation of prescription upon the entire interest—per Munro J. in *Parthasarathy v. Lakshmana*, 35 Mad. 231, 21 M.L.J. 467. In other words, a distinction should be drawn between cases in which the adverse possession of a third party began *after* the mortgage and cases in which the adverse possession began *before* the mortgage. Adverse possession against the mortgagor does not affect the right of the mortgagee, when it commences after the mortgage, but this rule does not apply if the adverse possession had begun *before* the mortgage, which was effected when the mortgagor was not in possession. Therefore, if the adverse possession had begun before the execution of the mortgage, the creation of the mortgage would not stop the running of time, and the mortgagee by purchasing the mortgaged property in execution of his mortgage-decree would not be entitled to recover possession of the property, if the adverse possessor had been in possession for more than 12 years—*Surendra v. Barisot Loan Co., Ltd.*, 34 C.W.N. 519 (521, 522), 50 C.L.J. 317, A.I.R. 1930 Cal. 313, 126 I.C. 257. This distinction was overlooked in the cases of *Ramaswami v. Poona*, 36 Mad. 97 and *Pratab v. Maheshwar*, 12 O.C. 45, 2 I.C. 57, where it was held that adverse possession which began against a mortgagor *after* the execution of the simple mortgage extinguished the security of the mortgagee also. (This view proceeded from a misconception of the Privy Council decision in *Karan Singh v. Bakar Ali*, 5 All. 1) These cases are not good law. The Madras case has been expressly overruled by the subsequent Full Bench case of *Vjapuri v. Sonamma*, 39 Mad. 811, and the Oudh case also should not be accepted as sound law.

An obstruction to a mortgagee obtaining possession (as purchaser) under his mortgage, by persons who merely claimed a lien on the property and admitted a mortgagor's title to the property, does not amount to adverse possession as against the mortgagee's title as purchaser—*Purnanand v. Jamnabai*, 10 Bom. 49 (57).

Possession obtained by a third party, not adversely to the mortgagee but under an agreement with the mortgagee, cannot be adverse to the

mortgagor. It is only when the possession commences to be in opposition to or in displacement of the mortgagor's rights and it comes to his notice or knowledge, that it becomes adverse to him—*Tarubai v. Venkatrao*, 27 Bom. 43 (69). The principle is that limitation does not begin to run against a plaintiff until he is under some necessity or duty to assert his title—*Ibid* (at p. 68). Thus, where after the redemption of a usufructuary mortgage, the tenants who had been let into possession of the mortgaged land by the mortgagee continued in possession, it was held that in the absence of notice to the mortgagor that the tenants claimed to hold adversely to him, possession of such tenants subsequent to the redemption was not adverse to the mortgagor, and they should be deemed to hold under the mortgagor under the same term as they held under the mortgagee—*Chinnappa v Pazhaniappa*, 18 M L T 492, 2 L W 1132, 31 I C. 630.

If the mortgaged property is redeemed by a third party with the knowledge and consent of the mortgagor, he gets a lien on the property which he must enforce within 12 years under Article 132, but so long as the lien exists, his possession is not adverse to the mortgagor. If he does not enforce his lien within 12 years, the lien will be extinguished, and if he still holds possession of the property, such possession is that of a person having no right and therefore adverse to the mortgagor. And if the adverse possession continues for more than 12 years, his title will become perfect, so that the mortgagor will be thereafter debarred from bringing a suit for redemption—*Sambhu v Nama*, 35 Bom. 438 (443). If the mortgaged property had been redeemed by the third party without the knowledge and consent of the mortgagor, the possession of the third party would have been adverse to the mortgagor from the date of redemption—*Ibid* (p 441)

617. Adverse possession by vendor or vendee —If the vendor remains in possession after sale, such possession is adverse to the purchaser, and if the purchaser does not bring a suit for possession within twelve years from the date of sale, he will be barred under this Article—*Ananda Coomari v Ali Jamin*, 11 Cal 229 (231), *Tew v Jones*, 13 M & W. 12.

If a sale takes place by an unregistered sale-deed, the possession of the purchaser under that deed becomes adverse to the vendor from the date of the valid sale—*Sheonath v Tulsi Pat*, 12 O L J 139, A I R 1925 Oudh 385, 87 I C 188, *Qadar Buksh v Mangha Mal* 4 Lah 249 (251), A I R 1923 Lah 495, 73 I C. 889, *Mahipal v Sarjoo* 13 O L J 326, 3 O.W.N 100, 92 I C. 99, A I R 1926 Oudh 141, *Bashir Husain v Chandrapal*, 25 O C 83, 68 I C 223, A I R. 1922 Oudh 133, *Jasoda v Janak Misra*, 4 Pat. 394, A I R 1925 Pat 787, 92 I C 1034

Possession by vendor as tenant —The plaintiff purchased some land under a deed of conditional sale which provided that the purchaser should become absolute owner if the vendor did not exercise his right of repurchase in ten years. After the execution of the deed, the vendor, according to the terms of the sale-deed, remained in possession of the

property as a tenant under the purchaser, and as such he and his representatives continued to hold over for more than twelve years after the date fixed in the sale deed. *Held* that the possession of the vendor after the date fixed in the sale-deed was that of a tenant holding over after the expiry of the term of the lease, and did not become hostile to the plaintiff so as to defeat the latter's claim to recover possession—*Anantha v. Holeya*, 19 Mad. 437 (439).

618. Adverse possession by trustee, Mohant, etc. :—

Where a trust is *express*, even though the *cestui que trust* chooses to put up with the acts of the trustee and takes no steps to recover the trust property for more than twelve years, yet he is not barred when he does so choose to pursue and endeavour to recover it. Section 10 applies to the case. But where the relations between the trustee and the *cestui que trust* are not *express* but have arisen by implication of law only, (*e g.*, in case of a *resulting* trust, upon failure of the declared trust) then if the trustee assumes an *adverse attitude* towards his *cestui que trust*, the latter must seek his remedy within the period of twelve years. But so long as the trustee occupies the position of a trustee as soon as the declared trusts have failed and there is a resulting trust in favour of the settlor, (*i.e.*, so long as he does not assume an adverse attitude) his possession is essentially that of his *cestui que trust* and can only be changed into adverse possession against the *cestui que trust* by a conscious and deliberate act. That is to say, he must repudiate all intention of holding for the resultant *cestui que trust* and he must assert his intention of continuing to apply the trust fund to uses which the Court has declared or which are known to him to have failed. In that event his possession becomes adverse to his legal *cestui que trust*, and if that person does not take steps within 12 years, he will not be able to avail himself of the provisions of section 10—*Casamally v. Currimbhoy*, 36 Bom 214 (239, 243, 244). This case has however been disapproved of in *Mahomed Ibrahim v. Abdul Latif* 37 Bom. 447 in which it has been held that a person claiming under a resulting trust is always barred by the 12 years' rule without reference to the question whether the trustee assumed an adverse attitude. See also *Kherodemoney v. Doorgamoney*, 4 Cal 455 which lays down that where a trustee takes possession of any property under a trust which is not valid under the law, his possession is adverse to the lawful title, and if the possession of this so-called trustee is for a period of more than 12 years, the rightful owner is barred.

Adverse possession by third party against trustee or *cestui que trust* :—Where a trustee in possession of lands has been dispossessed, and the twelve years have run after his dispossession, the *cestui que trust*, although entitled successively on the prior estate and estates, will be barred—*Wyck v. East India Co.*, (1734) 3 P. Wms. 308. Similarly, where a *cestui que trust*, who has been let into possession by the trustees, has been dispossessed and the twelve years have run after his dispossession (whereby the *cestui que trust* is barred), the trustees are also barred—*Melling v. Leak*, (1855)

16 C.B. 652. In other words, the rule that the statutes of limitation are no bar in the case of trusts is only a rule applicable between the *cestui que trust* on the one hand and the trustee on the other hand; and it is not a rule extending to third parties who have been in adverse possession—*Hovenden v. Lord Annesley*, (1806) 2 Sch. & Lef. 629; *Lewin on Trusts* (5th Edn.), pp. 623-625

Adverse possession against idol :—Although an idol is a perpetual minor for certain purposes, it is not a perpetual minor for the purpose of limitation. So, the property of an idol can be acquired by adverse possession as against the idol—*Chitar Mal v. Panchu Lal*, 48 All. 348, 93 I.C. 652, A.I.R. 1926 All 392, following *Damodar v. Lakhan Das*, 37 Cal. 885 (894) (P.C.), *Dasami v. Param Shameshwar*, 51 All. 621, 27 A.L.J. 473, 116 I.C. 433, A.I.R. 1929 All 315 (318). And the mere fact that the idol remained in the house of the adverse possessor does not make any difference; because there can be adverse possession not only against the idol but over the idol itself—*Dasami v. Param*, supra. Adverse possession can be acquired against the property of the idol not only by a total stranger but even by the donor himself—*Dasami v. Param*, supra. An idol installed in a particular *asthan* is a juridical person capable of holding property, and getting it managed through its manager, shebait or mohant, who would represent the idol for the time being completely, and possession, if adverse against the mohant or shebait for the time being must be deemed to be adverse against the idol or the institution—*Parkas Das v. Janki Ballabha*, 2 Luck. 239, 95 I.C. 27, A.I.R. 1926 Oudh 444, 3 O.W.N. Supp. 1, *Dasami v. Param Shameshwar*, 51 All. 621, A.I.R. 1929 All 315 (318), 116 I.C. 433

619. Adverse possession against successors in title :—The word "plaintiff" in column 3 includes a person through whom the plaintiff derives his right to sue. See sec 2 (8). It follows that if the statute has commenced to run against a person entitled, it continues to run both against him and as against persons deriving title under him, or claiming through him. Lightwood, p. 9. On this principle, possession which has already become adverse against a preceding trustee or shebait becomes adverse against the succeeding trustee or shebait as well. Thus, if a trustee or mohant of a temple or a shrine becomes dispossessed of the trust property, and the dispossessor is in possession of the property for more than 12 years, a suit brought thereafter by a succeeding trustee or mohant for possession of the property is barred. The period of limitation runs from the date of the dispossession of the previous trustee, and the *succeeding trustee does not get a fresh period of limitation* from the time when he succeeds to the office as trustee—*Chidambaram v. Minammal*, 23 Mad. 439 (440).

619A. Possession by manager —Where a Burmese Buddhist father at the time of his re-marriage made over certain lands to his four children by his first wife, but he continued in possession and management, *held* that the possession of the father was as that of a manager on

behalf of his children, and not adverse to their interest—*Maung Aung v. Maung San*, 5 Rang 576, A.I.R. 1928 Rang. 13, 105 I.C. 598. But where one co-heir, who was in possession of the property with the consent of the other co-heirs and was managing it on behalf of all, alienated a portion of the property, the act of alienation was one adverse to the interests of all; and the period of limitation for a suit by the other co-heirs for recovery of possession of the property ran from the date of sale, and not from the date of a subsequent suit for partition—*Maung Tun U v. Maung Tun Aung*, 5 Rang. 93, A.I.R. 1927 Rang. 158, 101 I.C. 691.

620. Possession between co-owners, co-sharers etc.:— Mere occupation or enjoyment or management of joint property by one co-sharer does not constitute adverse possession as against the other co-sharers, unless there is a disclaimer of the latter's title by open assertion of a hostile title by the former, or unless there is actual ouster or some act equivalent to ouster—*Baroda v. Annada*, 3 C.W.N. 774; *Ujvalbi v. Umakanta*, 31 Cal. 970 (1973); *Bhairabendra v. Rajendra*, 50 Cal. 487; *Ayenenussa v. Sheikh Isuf*, 16 C.W.N. 849; *Gobinda v. Upendra*, 47 Cal. 274 (278); *Hasim Ali v. Afzal Khan*, 40 C.L.J. 30; *Faizuddin v. Raju*, 21 C.L.J. 192; *Nilo v. Govind*, 10 Bom. 24; *Dinkar v. Bhikaji*, 11 Bom. 365; *Gangadhar v. Parashram*, 29 Bom. 300; *Amrita v. Shridhar*, 33 Bom. 317 (322); *Itappan v. Manavikrama*, 21 Mad. 153 (159); *Varada Pillai v. Jeevaratnammal*, 43 Mad. 244 (252) (P.C.); *Hashmal v. Mazhar*, 10 All. 343 (346); *Ahmed Razu Khan v. Ram Lal*, 37 All. 203; *Mubarakunnissa v. Muhammad Raja Khan*, 46 All. 377 (379), A.I.R. 1924 All. 384, 79 I.C. 174; *Mahipal v. Saroo*, A.I.R. 1926 Oudh 141, 3 O.W.N. 100, *Hardit Singh v. Gurmukh Singh*, 64 P.R. 1918 (P.C.), A.I.R. 1918 P.C. 1, 47 I.C. 626; *Chandbhai v. Hasanbhai*, 46 Bom. 213 (215), A.I.R. 1922 Bom. 150, 64 I.C. 205; *Velayutham v. Subbaroya*, 39 Mad. 879 (882); *Ma Fatima v. Morin*, 7 Rang 164; *Burns v. Bryan*, (1887) 12 A.C. 192. Many acts which would be clearly adverse and might amount to dispossession as between a stranger and a true owner of land, would, between joint owners, naturally bear a different construction—*Mahmad Ali Khan v. Khaja Abdul Gunny*, 9 Cal. 744 (753); *Venkatachalam v. Annapurni*, 55 M.L.J. 223, 109 I.C. 553, A.I.R. 1923 Mad. 652; *Prescott v. Nevers*, (1827) 4 Mason 326. The exclusive possession of one co-sharer, even though coupled with the non-payment of profits cannot amount to a clear adverse possession unless there has been an ouster of the other co-partners to their knowledge and openly. In the absence of a clear demand and a clear refusal, the possession of one co-sharer cannot become adverse as against the other—*Harkesh v. Hardevi*, 49 All. 763, 102 I.C. 66, A.I.R. 1927 All. 454.

The question whether exclusive possession by a co-sharer amounts to an ouster or not, depends upon the circumstances of each case. Where the remaining co-sharers had previously been in exclusive possession of all the joint lands without, however, denial of the plaintiff's right and without any objection by him, and they leased out to a third party a part smaller than what they would get on partition; held that there was no ouster—

Bibi Aimana v. Saburannessa, 32 C.W.N. 449 (451), following *Nabadwip v. Bhagaban*, 31 C.W.N. 496, A.I.R. 1927 Cal. 462, 101 I.C. 27. If one co-sharer separately occupies a portion of the common land without objection from his co-sharers and with their express or implied consent, such sole occupation is not to be regarded as amounting to exclusion or ouster of the other co-sharers from the possession of that portion, and they need not bring a suit for joint possession thereof. If the co-sharers are dissatisfied with the manner in which the plot of land is being held in possession by the first-named co-sharer, their proper remedy is to bring a suit for partition. On the other hand, if the separate occupation of a co-sharer is continued after objection from any of his co-sharers and in defiance of their claim to be in joint possession, then the co-sharers who are excluded and ousted from joint possession are entitled to bring a suit to obtain joint possession of the common property—*Durga Sankar v. Kamini Kumar*, 55 Cal. 653, A.I.R. 1928 Cal. 535 (536), 111 I.C. 74; *Ram Chandra v. Lakshmi Kanta*, 47 C.L.J. 603, 111 I.C. 19, A.I.R. 1928 Cal. 574.

Where a special relationship exists between the parties, such as tenants in common or members of an undivided family, the Court will presume that possession held by one is possession held on behalf of all the co-owners or members of the family, and it will lie on the possessor to prove that he held exclusive possession to the knowledge of those whose rights he seeks to affect by his possession—*Muthurakko Thevan v. Orr*, 35 Mad 618 (621); *Venkatachalam v. Annapurni*, 53 M.L.J. 233. When co-owners are in joint possession, the ouster of one co-owner has got to be proved very definitely, and the mere fact that the co-owner never enjoyed a definite benefit from the estate will not lead to the inference of ouster, if it is found that he visited the house from time to time and there was no break of social relation between the parties—*Ma Bu v. Makhatoon*, 7 Rang. 744, 121 I.C. 785, A.I.R. 1930 Rang. 72 (73). The mere entry of name in the mutation register is no indication of adverse possession until it is shown that it was obtained after a clear declaration to the effect that the title of the other co-sharers was denied—*Bashir Ahmed v. Parshotam*, 6 O.W.N. 536, A.I.R. 1929 Oudh 337. The entry on, and possession of, land under the common title of one co-owner will not be presumed to be adverse to the others but will ordinarily be held to be for the benefit of all the co-owners, for the reason that the possession of one co-owner is rightful possession and does not imply hostility as would be implied in case of possession by a stranger. A co-owner might however establish a plea of adverse possession if it is clearly shown that he repudiated the title of his co-owners by an overt claim to exclusive ownership for more than 12 years before suit—*Jogendra v. Baladeo*, 35 Cal 961 (968, 969), *Clymer v. Dawkins*, (1845) 3 Howard 674; *Hari Pru v. Mi Aung Kraw*, 12 Bur.L.T. 129, 52 I.C. 629. The overt acts which constitute a definite and continuous assertion of an adverse right must be of an unequivocal character clearly indicating an assertion of ownership of the premises to the exclusion of the right of the other co-tenants—*Jagannath v. Chandni*, 26 C.W.N. 65, A.I.R.

1921 Cal 647, 67 I.C. 31. And the burden lies on the defendant to shew, not merely that he has been in sole occupation of the disputed lands, but also that there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner either direct or to be inferred from notorious acts and circumstances—*Jogendra v. Baladeo*, 35 Cal. 961 (970); *Alima v. Kutti*, 14 Mad. 96 (97). Much stronger evidence is required to show an adverse possession held by a tenant-in-common than by a stranger, a co-tenant will not be permitted to claim the protection of the statute of Limitation, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him; it must further be established that the fact of adverse holding was brought home to the co-owner, either by information to that effect given by the tenant in common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and disseisin are intended to be asserted—*Jogendra v. Baladeo*, 35 Cal. 961 (969). Exclusion or ouster involves not merely the act of the person ousting but the state of mind of the person ousted. Knowledge on the part of the latter, therefore, is essential. Such knowledge may be proved directly or inferentially. On the principle of constructive notice it may also be proved by showing that the co-sharer against whom the possession was exercised had sufficient notice of facts or sufficient information which would put a reasonable person on enquiry and on receipt of which a reasonably attentive person could not but realise that he was ousted—*Abdul Wahed v. Mohan Bashi*, 34 C.W.N. 246 (249), A.I.R. 1930 Cal 466. If no actual notice is given to the co-sharer of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify an inference of knowledge on the part of the co-owner sought to be ousted, and of laches if he fails to discover and assert his rights—*Jagannath v. Chandni*, supra. But at the same time it is not the law that a non-diligent co-sharer is bound to suffer, he will suffer only if the circumstances unequivocally tell him that he has been ousted or excluded or when he has sufficient information that will put a reasonable man on enquiry which if pursued would unmistakeably show that he has been excluded or ousted—*Abdul Wahed v. Mohan*, supra. “A silent possession accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse ought not to be construed into an adverse possession”—per Marshall C J in *McClung v. Ross*, (1820) 5 Wheaton 116.

In the case of co-owners, the possession of one co-owner is in law the possession of the other co-owner as well, and it is not possible for one co-owner to put an end to that possession by any secret intention in his mind—*Corea v. Appuhamy*, [1912] A.C. 230. Nothing short of ouster or something equivalent to ouster can bring about that result—*Ibid*. To enable one of the co-owners to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive and hostile character as to amount to an ouster of the other owners. The only facts that one of the co-owners

has been in actual possession of a house, that he has been alone making repairs in it, and that a short time before the institution of the suit when certain portion of the house fell down, he built them afresh, do not constitute an act of adverse possession on the part of the co-owner, so as to extinguish the right of the other co-owners—*Mahadeo Prasad v. Ram Phal*, 1 Luck. 62, 3 O.W.N. 186, 92 I.C. 685, A.I.R. 1926 Oudh 258; *Sidheswar v. Ganga Sagar*, 13 O.L.J. 61, A.I.R. 1926 Oudh 464, 2 Luck. 172, 90 I.C. 455. So also, as between brothers in a joint family, where no partition is proved, the mere fact that one of the brothers went to live in a neighbouring village would not make the possession of the other brothers who continued to live in the family house necessarily adverse—*Jagivandas v. Bai Amba*, 25 Bom. 362 (365). Where a part of the property inherited by two sisters was in the exclusive possession of one, and the rest of the joint property was in joint possession, the exclusive possession of the particular portion was not adverse to the other sister in the absence of any facts from which an adverse possession may be presumed—*Barada Sundari v. Annoda Sundari*, 3 C.W.N. 774 (776). Where there has been no partition, mere non-participation in the rents and profits by one co-sharer and exclusive occupation by another would not constitute adverse possession against the former in favour of the latter—*Ittappan v. Manavikrama*, 21 Mad. 153 (159); *Dinkar v. Bhikaji*, 11 Bom. 365 (368); *Ahmadulla v. Bashir Ahmed*, 94 I.C. 855, A.I.R. 1926 J. 102, *Md. Wasil Ali v. Naimuddin*, 91 I.C. 614, A.I.R. 1926 J. 166. But such non-participation or non-possession may, in the circumstances of any particular case, amount to an adverse possession and among the circumstances to be taken into consideration are the relationship of the parties, their position, the mode of life in the particular community to which the parties belong, the character of the property, and other circumstances of a similar character—*Ayenenussa v. Sheikh Isuf*, 16 C.W.N. 849, 14 I.C. 722, *Gobinda v. Upendra*, 47 Cal. 274 (278), 23 C.W.N. 977, 56 I.C. 141. As between co-widows, the possession of one is not adverse to the other, especially if the latter receives a maintenance allowance from the former—*Indoobunse v. Girbhuran*, 12 W.R. 158.

The above rules apply not only among persons who are co-tenants, but extends to all who afterwards acquire undivided interests in the property, by purchase from the co-tenants. Thus, if the interest of a co-tenant is purchased by a third person, such purchaser becomes a tenant-in-common with the other co-tenants, and the possession of such co-tenants cannot, in the absence of clear proof to the contrary, be adverse to such purchaser. But if the purchaser, on going to the land to obtain possession is resisted by the other co-tenants, the possession of the co-tenants become adverse only from the date of such resistance—*Biswanath v. Rabija*, 56 Cal. 616, 33 C.W.N. 46 (49), 117 I.C. 593, A.I.R. 1929 Cal. 250. A purchaser from a co-sharer under an invalid sale-deed is in the same position as a co-sharer, and if he enters into possession under the invalid sale, his possession is not adverse to the co-sharers, in the absence of anything to show that he asserted a different

title from that of a co-sharer—*Sheo Raj v. Ajadhya*, 4 Luck. 503, 116 I.C. 195, A.I.R. 1929 Oudh 284 (285).

But it is not correct to say that one co-owner can *never* hold adversely to the other co-owner. The question depends upon the nature of the former's possession. Thus, one of the two-brothers, joint owners of certain *immoveable property*, executed a deed of *relinquishment* in favour of the other (the plaintiff). The deed was never registered, but the brother (plaintiff) in whose favour it was made remained in possession of the entire property. *Held* that the document (though unregistered), was admissible in evidence for the purpose of showing the nature of the plaintiff's possession from the date of the document, and that coupled with the other evidence in the case, it was sufficient to show that the plaintiff had been holding adversely to his brother—*Jhamplu v. Kutramani*, 39 All. 696 (698), 15 A.L.J. 761. See also 35 Cal. 961 cited *ante*. The possession of a co-owner is not ordinarily adverse to the other co-owners. But where a person originally entered not as a co-owner but asserting a hostile title, and then became a co-owner and continued to assert the hostile title and exercised his possession to the exclusion of the other co-owner, his possession did not cease to be adverse—*Pankaj Mohan v. Bipin Behari*, 38 C.L.J. 220, A.I.R. 1924 Cal. 118, 76 I.C. 511. Ordinarily, sole possession by one tenant-in-common is not adverse to the others, but sole possession by one tenant-in-common maintained continuously for a long period without any claim or demand by the other tenants-in-common is evidence from which an actual ouster of the latter may be presumed—*Gangadhar v. Parashram*, 29 Bom. 300; *Chandbhai v. Hasanbhai*, 46 Bom. 213 (216), 64 I.C. 205, A.I.R. 1922 Bom. 150; *Muhammad Ishaq v. Nathu*, 10 A.L.J. 59, 16 I.C. 342; *Culley v. Deo*, (1840) 11 A. & E. 1008.

After partition, the possession of one co-sharer cannot be taken as possession held on behalf of the others, even though the property has not been divided by metes and bounds—*Deba v. Rohlagi Mal*, 28 All. 479 (480).

620A. Adverse possession by Hindu female :—Where a widow is in possession of her life-estate in her husband's property, it is not competent to her, by mere assertion of an absolute proprietary title, in course of time to acquire such title by prescription against the reversionary heirs of her husband, who are not entitled to obtain possession till the widow's death—*Anund Kour v. Sodi Narindan*, 83 P.R. 1881. But where widows, who are only entitled to maintenance, take possession of the estate and dispose of it to strangers, and the possession of the widows and the strangers covers a period of more than 12 years, a suit by the reversioners after the lapse of 12 years from the date of the widows' taking possession, would be barred, unless such possession was under an arrangement with the reversioners—*Sham Koer v. Dah Koer*, 29 Cal. 664 (P.C.). If a Hindu widow who has not a scrap of title to the possession of the property (e.g. a widow, during the life of her son or son's widow) takes possession of the property not in the capacity

of a widow but absolutely and without any qualification, and makes a gift of the property to strangers, her possession would be a bar to the title of all persons who claim as reversioners either of her husband or of her son—*Lachhan Kuwar v. Manorath*, 22 Cal. 445 (449) (P.C.). Where the widow asserted that she was entitled as full heir to the separate share held by her husband; where in a written statement in a suit brought against her she had asserted that she and her co-widow were the heirs of their husband and had all along been in possession and it was only as an alternative pleading that she set up a title to possession on the footing of a right to maintenance; where in an application to the Court she made an assertion publicly that she and her co-widow were the heirs and the only heirs to the property, from which assertion mutation of it to her name followed; where the widow made an absolute gift of part of the property; and where she made such public assertion of a right to exclusive possession from 1859 to her death in 1895, the true inference was that her possession was adverse, and the reversioner's title was barred by limitation—*Satgur Prasad v. Raj Kishore Lal*, 42 All. 152 (157) (P.C.). Where, according to the custom of the community to which the parties belonged, the widows were excluded from inheritance, the widow's possession for more than 12 years barred the reversioner's suit for possession—*Desai Ranchhoddas v. Rawal Nathubhai*, 21 Bom. 110 (117). A separated Hindu died leaving two widows and a daughter-in-law, the widow of his predeceased son. Upon the death of the two widows, the daughter-in-law took possession of the property and remained in possession thereof for more than 12 years, and after her death the reversioners sued to recover possession. Held that as the widow's daughter-in-law was not entitled to the estate, her possession must be regarded as adverse to the reversioners, whose cause of action accrued upon the death of the two widows of the last male holder. The suit was therefore barred—*Gajadhar v. Parbati*, 33 All. 312 (314). Where the widow of a member of a joint Hindu family takes possession on the death of her husband of property which was in his possession during his lifetime, there is no presumption that the possession taken is merely that of a widow of a separated Hindu. In the absence of any evidence to show that her claim was limited to a widow's estate, she must be held to have acquired full title—*Kali Charan v. Piari*, 46 All. 769 (771), 22 A.L.J. 725, 83 I.C. 754, A.I.R. 1924 All. 740; *Rikhdoo v. Sukhdoo*, 49 All. 713, A.I.R. 1928 All. 45, 102 I.C. 175; *Uman Shankar v. Aisha Khatun*, 45 All. 729, A.I.R. 1924 All. 86, 74 I.C. 869. It is not an invariable rule that wherever a Hindu widow is found in adverse possession, she must be treated as being in adverse possession of a widow's estate only. Where it is found that a Hindu widow took possession of the property absolutely and not in lieu of maintenance or as the result of any arrangement with the heirs and successors of the last male holder at any time, she acquires full title by adverse possession—*Raj Bahadur v. Kanhaiya Balhsh*, 4 O.W.N. 350, 99 I.C. 890, A.I.R. 1927 Oudh 138.

Where, A, a widow who inherited the property of her husband and was entitled only to a limited interest, transferred certain property of

her husband to B the widow of a predeceased coparcener of her husband in 1833, and the latter remained in possession of the property for more than 12 years after the death of A (which took place in 1843) and then B transferred the property to the defendants as though she had absolute title in it, and then died in 1886, and then the plaintiffs who were the reversionary heirs of the last male holder (and as such entitled to the property after A's death) sued to recover possession of the property in 1888, *held* that the suit had been barred long ago by the adverse possession of B for more than 12 years after A's death (1843). Although a widow's estate for life never constitutes a possession adverse to the reversionary heir, still since in this case B did not obtain the property as a widow but in a different capacity, her possession for more than 12 years after A's death became adverse to the reversioners (plaintiffs) entitled to come in after A's death—*Mahabir v. Adhikari*, 23 Cal. 942 (P.C.).

Possession taken by a Hindu widow under an arrangement with the other members of the family and in pursuance of an award, cannot be adverse to the members of the family—*Radha Dulaiya v. Rashuck Lai*, 45 All. 1 (5), A.I.R. 1923 All. 25, 75 I.C. 14, 20 A.L.J. 814.

If a Hindu widow in possession of her husband's estate never claimed to have anything more than the limited estate of a Hindu female, she did not acquire any personal title to the property as *her stridhan*, but she makes it good to the estate of her deceased husband—*Lajwanti v. Safa Chand*, 5 Lah. 192 (199) (P.C.), 28 C.W.N. 960, 80 I.C. 788, A.I.R. 1924 P.C. 121; *Umrao Singh v. Pirthi*, 86 I.C. 445, A.I.R. 1925 All. 369; *Chakradhar v. Shabkant*, 6 P.L.T. 363, 88 I.C. 767, A.I.R. 1925 Pat. 460; *Brindaban v. Ram Narain*, A.I.R. 1925 All. 330, 85 I.C. 449; *Deshrani v. Thakur Kishore Singh*, 22 N.L.R. 175, A.I.R. 1927 Nag. 104, 100 I.C. 446. If a widowed daughter-in-law, who was not entitled to succeed to her father-in-law's property, but was entitled only to maintenance, was allowed to remain in possession of the property in lieu of maintenance, and there was no evidence to show that she asserted any title adverse to the person entitled to inherit the property, *held* that the widow did not acquire the property as *her stridhan*, and that the only interest which the widow could have in the property was that of maintenance only. Consequently, an alienation of the property made by her was voidable after her death by the heirs of her father-in-law—*Jagmohan v. Prayag Narayan*, 6 P.L.T. 206, 87 I.C. 473, A.I.R. 1925 Pat. 523. But if the female claims to hold the property not merely for her life, but absolutely, the property so held by her for 12 years would become her absolute property—*Maluka v. Pateshar*, 1 Luck. 273, 3 O.W.N. 536, 96 I.C. 672, A.I.R. 1926 Oudh. 371; *Varada Pillai v. Jeevaratnammal*, 43 Mad. 244 (252) (P.C.).

When a widow, who is entitled only to maintenance and residence, continues in possession of the property after the death of the last male holder, to whom she is not the heir, and she holds possession simply because the reversioners have not yet come forward to take possession, her possession cannot be said to be adverse until the reversioners assert

their right to possession and demand it from her. There can be no question of adverse possession prior to such assertion—*Muthuswami v. Ponnayya*, 51 Mad. 815, 55 M.L.J. 436, A.I.R. 1928 Mad. 820 (822), 110 I.C. 613.

621. Other cases of adverse possession.—In case of a religious endowment, if adverse possession is proved, time will run not only against the shebait, but against the idol also, and time will run against the idol even in a case where no shebait has been appointed—*Administrator-General v. Balkissen*, 51 Cal 953 (959), A I.R. 1925 Cal. 140, 84 I.C. 91.

Under a mortgage of 1869 the mortgagee was entitled to immediate possession, but by arrangements between the parties, the mortgagor was allowed to remain in possession, the right of the mortgagee to claim possession being kept alive. The property was sold by the mortgagor in the same year. A suit for pre-emption was brought in respect of such sale and decree, and the pre-emptor thereafter sold the property to the defendant in 1871. The mortgagee sued the defendant for possession in 1883. The defendant pleaded adverse possession for more than twelve years. *Held* that the possession of a person who purchases property by asserting a right of pre-emption is not analogous to that of an auction-purchaser in execution of a decree. He merely takes the place of the original purchaser, and enters into the same contract of sale with the vendor (mortgagor) that the purchaser was making. There is privity between him and the vendor, and he comes in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. Neither the possession of the pre-emptor nor that of the purchaser from him in 1871 is adverse to the mortgagee—*Durga Prasad v. Sambhu Nath*, 8 All. 86 (90, 91).

Where lands granted to one member of a joint Hindu family were held by the joint family adversely to the individual interest of the grantee and his son, for more than twelve years, the rights of the grantee and his son were barred—*Vasudeva v. Maguni*, 24 Mad. 387 (396) (P.C.)

A wife, during the prolonged absence of her husband, who was erroneously supposed to be dead, made a *mourasi* grant of a portion of her husband's estate. The grantee remained in possession for upwards of 12 years. It was held that the lease being void, the position of the grantee was not that of a lessee but that of a trespasser, and that his possession for more than 12 years had perfected his title—*Bejoy Chunder v. Kally Prosonna*, 4 Cal. 327 (330).

Where the property of a deceased Hindu vests in an executor, in trust for the beneficiaries under the will, and the bequest fails, such executor does not under the Indian law hold the property in trust for the heir of the deceased. A Hindu executor takes no estate (unlike an English executor) but only a power of management, and upon the purpose for which the executor is to hold the property failing, the property undisposed of vests in the heir at once. Consequently, the possession by

the executor becomes adverse to the heir from the date of the testator's death—*Kherodemoney v. Doorgamoney*, 4 Cal. 455 (468).

Where a person has been in possession of a property for over 12 years as legatee with an absolute estate under a will by a testator who had no disposing power over the property, and no objection has been made by the persons entitled to the property, the person in possession acquires an absolute title to the property—*Ghanshamdoss v. Saraswathibai*, 21 L.W. 415, 87 I.C. 621, A.I.R. 1925 Mad. 861.

Possession of plaintiff's land taken by an adjoining landowner under a mistake on the part of both parties as to the true boundary is adverse to the plaintiff—*Ma Shan v. Somasundaram*, 1 Rang. 492, A.I.R. 1925 Rang. 111, 83 I.C. 132.

Adverse possession of fishery rights can be established in a public navigable river, if exclusive acts of possession are shown for the statutory period—*Debendra Lal v. Secretary of State*, 31 C.W.N. 473, A.I.R. 1927 Cal. 403, 103 I.C. 13.

621A. Adverse possession of a limited interest :—

Possession of a *limited interest* in immoveable property may be just as much adverse for the purpose of barring a suit to recover that interest, in the same way as adverse possession of a complete interest in the property operates to bar a suit for the whole property; consequently, such possession of a limited interest may be just as much as adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property. Such adverse possession for limited interest is good only to the extent of that interest, though it is a good plea to a suit for ejectment—*Ishan v. Ramranjan*, 2 C.L.J. 125; *Gopal Krishna v. Lakhiram*, 16 C.W.N. 634 (636), 14 I.C. 212; *Icharam v. Nilmoney*, 35 Cal. 470 (476); *Madhava v. Narayana*, 9 Mad. 244 (247); *Fateh Singhji v. Bamanji*, 27 Bom. 515 (536); *Swarnomoyi v. Sourindra*, 42 C.L.J. 14, A.I.R. 1925 Cal. 1189, 89 I.C. 747; *Sankaram v. Periasami*, 13 Mad. 467 (471); *Bhairabendra v. Rajendra* 50 Cal. 487 (490), A.I.R. 1924 Cal. 45, 74 I.C. 193; *Budesab v. Hanmanta*, 21 Bom. 509. Where in an ejectment suit by an inamdar, it was shown that the defendants for more than 12 years before suit openly asserted their claim to hold as mirasi tenants, it was held that the defendants had acquired a title to the limited interest claimed by them, and could not be ejected—*Trimbak v. Gulam Jilani*, 34 Bom. 329; *Narhar v. Ganpati*, 31 Bom. L.R. 218, 117 I.C. 438, A.I.R. 1929 Bom. 174 (175). But the tenant will acquire only the limited interest claimed by him, but not proprietary interest. If a trespasser while in possession claims a right less than the absolute ownership in the land, he will acquire by prescription only the inferior title set up by him. The title acquired will be determined by the *animus possidendi* of the trespasser—*Muthurakkoo v. Orr*, 35 Mad. 618 (621). Thus, if a tenant encroaches upon the lands of his landlord outside his tenancy, and claims to hold these lands as part of his tenancy, (*i.e.*, he professes to hold these lands in his character as a tenant), and thus he

holds possession of those lands for more than 12 years, the landlord's right to eject the tenant and recover khas possession is lost; but his proprietary possession (i.e., possession by receipt of rent) is not lost, because the possession of the tenant, so far as the latter right is concerned has not been adverse—*Ishan v. Ramranjan* (supra); *Gopal v. Lakhiram* (supra); *Muthurakkoo v. Orr*, (supra). So also, where a landlord seeks to recover possession of land in his tenant's occupancy, and the tenant on the allegation of a perpetual tenancy successfully resists the landlord's attempt to dispossess him for the statutory period, the tenant can afterwards successfully plead the law of limitation in bar of a subsequent suit in ejectment by the landlord—*Budesab v. Hanmanta*, 21 Bom. 509 (515). In other words, the tenant, by asserting a claim to hold as a permanent tenant, will acquire a permanent tenancy. The landlord's possessory right is extinguished, but his proprietary interest (i.e., right to receive rent) remains intact. See also *Fatehsinghi v. Bamanji*, 27 Bom. 515 (546). So again, where a tenant transferred a non-transferable occupancy holding and the transferee was in possession for more than 12 years but he never repudiated the title of the landlord but claimed to hold possession as tenant, held that a suit for recovery of actual possession by ejectment of the transferee (defendant) was barred by limitation. Although the defendant did not set up an absolute title for the statutory period and had not consequently acquired by adverse possession such absolute title, he has yet acquired by prescription the limited interest which he has set up, namely the interest of a tenant. Consequently it was too late for the plaintiff-landlord to seek to eject the defendant as a trespasser; his title to recover actual possession was barred, although his title to recover rent was not extinguished—*Icharan v. Nilmoney*, 35 Cal. 470 (477), *Bhairabendra v. Rajendra*, 50 Cal. 487 (490), A.I.R. 1924 Cal. 45, 74 I.C. 193.

In 21 Bom. 509 and 27 Bom. 515 cited above, the tenant by pleading a permanent tenancy had successfully resisted the landlord's previous suit for possession. But where the landlord at first filed a suit to recover possession from the tenant (who was a yearly tenant), and the tenant unsuccessfully pleaded permanent tenancy, so that the landlord obtained a decree for possession, but the tenant continued in possession and paid rent, and 20 years afterwards the landlord again brought a suit in ejectment and the tenant again pleaded permanent tenancy, held that the plea could not prevail. Here there had been no successful resistance by the tenant of the landlord's claim to recover the possession (in the first suit); the landlord had succeeded and though the tenant had remained in possession, it is not shown that he remained in possession in assertion of a hostile title. Consequently the landlord would get a decree for possession—*Bhatil v. Kalansang*, 52 Bom. 55, 107 I.C. 52, A.I.R. 1927 Bom. 667 (668). See also *Md. Mumtaz Ali v. Mohan*, 45 All. 419 (P.C.), A.I.R. 1923 P.C. 118, 28 C.W.N. 840, 74 I.C. 476; *Madhav rao v. Raghunath*, 47 Bom. 798 (P.C.), A.I.R. 1923 P.C. 205, 74 I.C. 362; *Namapillai v. Ramanathan*, 47 Mad. 337 (P.C.), A.I.R. 1924 P.C. 65, 82 I.C. 226, 28 C.W.N. 800.

A tenant is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been adverse to the right to evict either at will or on notice given—*Thakore Fatesangji v. Bamanji*, 27 Bom. 515 (539); *Ram Rachhaya v. Kamakhya Narain*, 4 Pat. 139, A.I.R. 1925 Pat. 216, 84 I.C. 586

The mere fact that the tenant made a yearly payment of rent is not fatal to the plea of adverse possession set up by the tenant; because the tenant is not denying the landlord's right to receive rent but merely denies the landlord's right to eject him, and claims to be a permanent tenant—*Sankaran v. Periasami*, 13 Mad. 467 (471); *Thakore Fatesinghji v. Bamanji*, 27 Bom. 515 (536, 540); *Charan Mahton v. Kamakhya Narain*, 6 P.L.T. 98, A.I.R. 1925 Pat. 357, 86 I.C. 387.

So also, the landlord's claim for enhanced rent may be barred, if the tenant denies the landlord's right to claim enhanced rent and continues to pay the original rent, for more than 12 years. In such a case, the tenant will be entitled to continue to hold the land at the original rate of rent—*Gopalrao v. Mahadevrao*, 21 Bom. 394 (396).

621B. Effect of symbolical possession:—If the purchaser of a property in execution of a decree finds that the property is in the possession of the judgment-debtor or some other person, he may either make an application for delivery of possession under O. 21, rr. 95 and 96, or he may bring a suit for possession. The application falls under Art. 180, and the suit is governed by Art. 137 or 138. If the purchaser makes an application, and obtains only symbolical possession, but fails to obtain actual possession by reason of the judgment-debtor or other persons continuing in possession of the property, he may bring a regular suit for possession and such suit falls under Art. 144. As to the starting point of limitation in such suits, the question has to be considered from two points of view:—(1) Whether the property is or is not capable of actual possession; and (2) whether the defendant was a party to the proceedings in which symbolical possession was delivered to the plaintiff.

(1) If the property is not capable of actual possession, (e.g. if it is in the occupation of tenants, or other persons entitled to possession, or is an undivided share in joint property), so that the only possible method in which the auction-purchaser can take possession is symbolical possession, such symbolical possession is equivalent to actual possession and gives to the auction-purchaser a new starting point of limitation, and time runs from the date of delivery of symbolical possession, and not from the date of the sale or the date of confirmation of the sale—*Mahadev v. Janu*, 36 Bom. 373 (F.B.); *Juggobundhu v. Ram Chandra*, 5 Cal. 584 (F.B.); *Rajendra v. Bhugwan*, 39 All. 460 (463); *Gulab v. Ataula*, 5 O.W.N. 372 (F.B.), A.I.R. 1928 Oudh 251, 110 I.C. 70; *Sita Ram v. Ramsundar*, 50 All. 813, A.I.R. 1928 All 412 (413), 26 A.L.J. 573 (undivided share in joint property). But if the property is capable of delivery of actual possession (e.g. if the property is in the possession of the judgment-debtor himself, so that he can be evicted from the property), but

the auction-purchaser gets only symbolical possession, does the symbolical possession operate as actual possession as against the judgment-debtor, and give the purchaser a fresh period of limitation? The views of the High Courts are divergent. According to the Calcutta High Court, symbolical possession is equivalent to actual possession, even though actual possession could have been delivered. The symbolical possession, though erroneous, is still possession through an officer of the Court and by process of the law; therefore the judgment-debtor who was a party to the proceeding relating to the delivery of possession cannot ignore it or treat it as a nullity. The period of limitation for the purchaser's suit for possession against the judgment-debtor runs from the date of delivery of the symbolical possession—*Hari Mohan v. Baburali*, 24 Cal 715; *Bhulu v. Jatindra*, 27 C.W.N. 24, 77 I.C. 1035, A.I.R. 1923 Cal 138. The same view is taken by the Madras High Court—*Govind v. Venkata*, 17 M.L.J. 598; *Kamayya v. Mahalakshmi*, 53 M.L.J. 339, 105 I.C. 243, A.I.R. 1927 Mad. 849 (dissenting from *Govindasami v. Pethapurmal*, 44 I.C. 839). The Bombay High Court is of opinion that symbolical possession given under circumstances in which actual possession ought to have been delivered, is a nullity, and the judgment-debtor will be regarded as being still in possession as from the date of sale. Time will run from the date of the sale, and no fresh period will run from the date of taking symbolical possession—*Mahadev v. Janu*, 36 Bom. 373 (378) (F.B.); *Raghunath v. Kondiba*, 46 Bom. 932 (936), 68 I.C. 91, A.I.R. 1922 Bom 2, *Shridhar v. Ganpati*, 43 Bom. 559; *Lakshman v. Moru*, 16 Bom 722. [The ruling in 36 Bom. 373 has been doubted in *Mahadevappa v. Bhima*, 46 Bom. 710 (715)] The same view is taken by the Allahabad High Court—*Jang Bahadur v. Hanwant*, 43 All 520 (524) (F.B.).

(2) As to the second point, it, has been authoritatively laid down by the Judicial Committee that if symbolical possession is delivered to the auction-purchaser, it is sufficient to put a stop to the previous adverse possession of a person who was a party to the proceedings in which symbolical possession was delivered—*Radha Krishna v. Ram Bahadur*, 22 C.W.N. 330 (P.C.), A.I.R. 1917 P.C. 197, 43 I.C. 268, 16 A.L.J. 33. Thus, if symbolical possession is delivered to the auction-purchaser, the judgment-debtor who was and must be taken to be a party to the execution proceedings, cannot treat the delivery of possession as a nullity, and claim to continue to be in adverse possession as from the date of the sale. His previous possession comes to an end, and in a suit for possession by the auction-purchaser, the period of limitation runs (under Art. 144) from the date of taking symbolical possession, and not from the date of confirmation of sale under Art 138—*Hari Mohan v. Baburali*, 24 Cal. 715 (719, 720); *Mangli v. Debi Din*, 19 All 499; *Narain v. Latta*, 24 All. 269 (271); *Junoki Nath v. Baikuntha*, 27 C.W.N. 259, A.I.R. 1922 Cal. 176; *Kamayya v. Mahalakshmi*, 53 M.L.J. 339, 105 I.C. 243, A.I.R. 1927 Mad. 849 (850), *Pratap v. Sunderbans*, 3 P.L.T. 628, A.I.R. 1923 Pat. 76; *Harbhagwan v. Taja*, 26 P.L.R. 546, A.I.R. 1926 Lah 35; *Jogobundhu v. Purnanund*, 16 Cal. 530 (F.B.). Symbolical

interval of some months after his father's eath, the defendant was held to be an independent trespasser, and could not add his own possession to that of his father (alleging that the encroachment had been begun by his father), and hence there was no adverse possession for 12 continuous years to extinguish the plaintiff's title—*Midnapore Zemindary Co. v. Panday*, 2 P.L.J. 506 (511), 41 I.C. 114. "In order that the title of the wrong-doer may be barred by the adverse possession of a series of trespassers, the possession by them must be continuous;..... but if a period of time should elapse, however short, after the abandonment of one trespasser who has not been in full statutory period, and before the entry of another, the title of the true owner is, as from the time of such abandonment, restored to him without any entry or act done on his part"—*Dart's Vendors and Purchasers*, (7th Ed.) Vol. I, page 474.

622A. Interruption or cessation of adverse possession :—If, while the defendant is in adverse possession, the rightful owner somehow manages to oust him, and obtains possession, the adverse possession is interrupted, and comes to an end; and if the defendant again dispossesses the rightful owner under a decree obtained under sec. 9 Specific Relief Act, the period of limitation for a suit by the owner to recover possession would run from the date of the second dispossession (under the decree), and not from the date of the original adverse possession—*Jonab v. Surya Kanta*, 33 Cal. 821 (825); *Prolab Chandra v. Durga Charan*, 9 C.W.N 1061 (1064). See Note 595 under Art. 142. In other words, the adverse possession comes to an end in consequence of a re-entry by the true owner. But the re-entry, in order to vest the possession in the person entering and to prevent the bar of the statute, must be effective, as opposed to a merely formal entry. The making an entry amounts to nothing unless something is done to divest the possession out of the trespasser and re-vest it in fact in the owner—*Doe v. Coombes*, (1850) 9 C.B. 714 (at p. 718).

The statute ceases to run also, if the adverse possessor quits the land and leaves the possession vacant. "If a person enters upon the land of another, and holds possession for a time, and then, without having acquired any title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects, as he was before the intrusion took place. The possession of the intruder, ineffectual for the purpose of transferring title ceases upon the abandonment to be effectual for any purpose. It does not leave behind it any cloud in the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant"—per Lord Macnaghten in *Agency Co. v. Short*, (1888) L.R. 13 A.C. 793.

Thus if during the continuance of adverse possession, and before he has completed the 12 years, the defendant voluntarily abandons the land, the rightful owner is in the same position in all respects as he was before the intrusion took place—*Secretary of State v. Krishnamoni*,

29 Cal. 518 (535) (P.C.), following *Agency Co. v. Short*, supra. If the defendant's possession comes to an end by *vis major* (e.g. submergence of land), it has the same effect as voluntary abandonment—*Ibid* (at p. 535); *Mazhar Hussain v. Behari Singh*, 28 All. 760 (762).

If, during the continuance of possession, the defendant, before he has completed 12 years, is ousted from the land by a decree obtained against him by a third person, which however is subsequently reversed and the defendant recovers possession, such erroneous decree would not prejudice the defendant, and the wrongful possession given to the third person by such decree would not prevent the continuous running of time against the plaintiff and in favour of the defendant—*Dagdu v. Kalu*, 22 Bom. 733 (736).

A judgment of a Court declaring that a party in possession of immoveable property has no title to it has not the effect of interrupting the continuity of his adverse possession as against the real owner, if the party continues in possession in spite of that judgment, and his possession remains undisturbed. The judgment rather appears to emphasize the adverseness of the possession of the trespasser as against the real owner—*Singaravelu v. Chokkalunga*, 46 Mad 525 (527) (dissenting from *Mir Akbar Ali v. Abdul Aji*, 44 Bom. 934); *Shaik Mukbool Ali v. Shaik Wajid Hossain*, 25 W.R. 249; *Raghunath v. Tiruvengada*, 9 M.L.T. 171, 8 I.C. 883; *Ayissa v. Lakshmana*, 1911 M.W.N. 207, 9 I.C. 795; *Akbar v. Tabu*, 45 P.R. 1914, 22 I.C. 805, *Hans Raj v. Maulu*, 63 I.C. 881 (882) (Lah.). But the Bombay High Court is of opinion that such a decree puts an end to the adverse possession of the party in possession, and he must, if he wishes to acquire a good title by adverse possession, start afresh after the decree—*Mir Akbar Ali v. Abdul Aji*, 44 Bom. 934 (938).

623. Suits under this Article:—*Suit by adopted son*—A suit by an adopted son to set aside an alienation made by his adoptive mother before the adoption, and for possession, is governed by this Article, and limitation, runs from the date of adoption, not from the date of alienation—*Sreeramulu v. Kristamma*, 26 Mad 143 (147); *Sitaram v. Rajaram*, 48 I.C. 230; *Venkataratnam v. Venkataramiah*, 27 M.L.J. 569, 25 I.C. 692; *Hari v. Waman*, 2 Bom L.R. 441, *Moro v. Balaji*, 19 Bom 809 (816); *Ramakrishna v. Tripurabai*, 33 Bom 88 (95).

A suit by the adopted son of the junior widow to recover property from the adopted son of the senior widow on the ground that the adoption of the latter is invalid, falls under this Article, and limitation runs not from the date of the adoption of the plaintiff, but from the time when the defendant had taken possession of the property; see *Padajurav v. Ramrav*, 13 Bom. 160.

A suit for possession by an adopted son against the defendant who is in wrongful possession of the properties left by the plaintiff's adoptive father is governed by this Article, and not by Art. 119, even if the plaintiff's adoption is denied—*Chandania v. Salig Ravi*, 26 All. 40 (47, 48). See Note 494 under Article 119.

Suits involving setting aside of sales etc. :—Where the main relief sought is the recovery of immoveable property, and a declaration of the invalidity of an instrument is sought only as an incidental step, the case will be governed by the 12 years' rule of limitation. Thus, where the alienation of a property is *void*, it does not require to be set aside, and a suit for recovery of the property by avoidance of such transfer is governed by this Article and not by Arts. 44, 91 and other similar Articles. See Note 330 under Article 44 and Note 420 under Article 91.

Where a property not belonging to the judgment-debtor but to a stranger is sold in execution of a decree, such stranger may treat the sale as a nullity, and sue to recover the property at any time within twelve years from the sale; such a suit is not governed by Art 12—*Jawala v. Masiat*, 26 All. 346 (353). See Note 281 under Article 12.

Suit against redeeming co-mortgagor :—Prior to the amendment of the Transfer of Property Act in 1929, it was held that a co-mortgagor redeeming the entire mortgaged property and obtaining possession merely acquired a charge under sec. 95 Transfer of Property Act, and did not become a "mortgagee" within the meaning of Article 148; and a suit brought against the redeeming co-mortgagor by the other co-mortgagors to recover their shares of the property was not a suit for redemption under Article 148 but a suit for recovery of possession under this Article—*Vasudeb v. Balaji*, 26 Bom. 500 (503); *Ramchandra v. Sadashiv*, 11 Bom. 422; *Vithal v. Dinkarrao*, 3 Bom.L.R. 685; *Kaki Abas v. Faki Nurudin*, 16 Bom. 191; *Makhdam v. Jodi*, 9 O.C. 91; *Basanta v. Dhanna*, 55 I.C. 450 (451) (Lah.); *Sheo Ganga v. Ranjit Singh*, 52 I.C. 375 (Oudh); *Munia v. Ramasami*, 41 Mad. 650 (657); *Purna Chandra v. Barada*, 46 Cal. 111 (116); *Jatkishan v. Budhanand*, 38 All. 138 (145); *Ram Narayan v. Ram Denu*, 6 P.L.J. 680, 63 I.C. 282 (283); *Narain Das v. Saroj Din*, 27 P.L.R. 65, 92 I.C. 980, A.I.R. 1926 Lah. 238; *Wajihuddin v. Ahmad Ashraf*, 2 Luck. 618, A.I.R. 1927 Oudh 347; and limitation ran not from the date of the possession by the redeeming co-mortgagor but from the date when the possession became adverse by the assertion of an exclusive title—*Rama Chandra v. Sadashiv*, 11 Bom. 422 (425), *Faki Abas v. Faki Nurudin*, 16 Bom. 191; *Bhauddin v. Sk. Ismail*, 11 Bom. 425 (429); *Vithal v. Dinkar*, 3 Bom.L.R. 685; *Makhdam v. Jodi*, 9 O.C. 91. That is, time ran when the redeeming co-mortgagor denied the right of the other mortgagors to enter into possession until they had paid to him their shares of the charge upon the property which he has defrayed—*Narain Das v. Saraj Din*, (supra); *Wazir v. Girdhari*, 71 I.C. 847.

On the other hand, it was held in *Ashfaq v. Wazir*, 14 All. 1 (F.B.), *Khiali Ram v. Taik Ram*, 38 All. 540 (547), *Nura Bibi v. Jagat*, 8 All. 295 (300), *Saiduddin v. Ratanlal*, 32 All. 160 (162) and *Wazir Ali v. Ali Islam*, 40 All. 683 (685) that a suit against the redeeming co-mortgagors falls under Article 148 (and not under Article 144) on the ground that the redeeming co-mortgagor stands in the shoes of the mortgagee, and the period of limitation runs from the date when the original mortgage becomes redeemable and not from the time when the defendant redeems the mortgaged property.

Under section 92 Transfer of Property Act (as recently amended in 1929) a redeeming co-mortgagor stands on the same footing as a mortgagee; so that a suit against him by the other co-mortgagors for recovery of the property is really a suit for redemption (Art. 148) and not a suit for possession (Art. 144). The latter set of rulings cited above (14 All. 1, 38 All. 540, etc.) will now stand as correct, and the former set of rulings (26 Bom. 500; 11 Bom. 422 etc.) are no longer good law.

Other suits:—A suit to recover certain land, the title to which had been declared in favour of the plaintiff by an award, is not a suit to enforce specific performance of a contract under Article 113 (because an award is not a contract) but one falling under this Article; limitation runs from the date of the award—*Sornavalli v Muthayya*, 23 Mad. 593 (596); *Bhajahari v. Behary Lal*, 33 Cal. 881 (883, 885); *Sheo Narain v Beni Madho*, 23 All. 285 (287) See Note 471 under Article 113.

Where a vendor delivers possession of only a part of the property sold, the remedy of the vendee is not by a suit for specific performance but by a suit for recovery of possession of the rest of the property; and such a suit is governed by Art. 144 and not by Article 113—*Bhanjan v. Sohaura*, 18 P.R. 1911, 92 P.L.R. 1911, 9 I.C. 238 (239).

Where a vendor was out of possession at the time of sale, and subsequently recovered possession, a suit by the vendee to recover possession from the vendor would be governed by this Article (and not by Article 136), and the cause of action arises from the date of recovery of possession by the vendor and not when the vendor had been originally dispossessed—*Ram Prasad v. Lakhi*, 12 Cal. 197 (199); *Sheo Prasad v. Uday*, 2 All. 718; *Syed Nyamtulla v. Nana*, 13 Bom. 424 (428).

Where the defendant has planted certain trees on the waste lands of the plaintiff, a suit for removal of the trees and for recovery of possession falls under this Article, and not under Article 32—*Muhammad Shafi v. Bindesswari*, 46 All. 52, A.I.R. 1924 All. 443, 75 I.C. 266

A suit by one of the heirs of a Muhammadan for partition of the property left by the deceased, is governed by Art. 144, so far as the immoveable property is concerned, and by Art. 120 as regards the moveables—*Syed Noordeen v. Syed Ibrahim*, 34 Mad. 74 (75)

A suit by the donor's heirs for recovery of possession of property endowed to an idol, on the ground that the endowment was invalid, is governed by this Article, and must be brought within twelve years from the date of the gift—*Sitaramji v. Jadunath*, 24 I.C. 72 (79) (Oudh)

624. Starting point of limitation:—Limitation runs when the possession of the defendant becomes adverse to the plaintiff. Any overt act by the person in possession of the property starts adverse possession. The fact that the plaintiff (the party having title to the property) was not aware of the overt act does not make the possession less adverse—*Khuda Baksh v. Karmun*, 49 P.L.R. 1915, 27 I.C. 610 (611).

A Hindu widow in possession of her husband's property mortgaged it with possession in 1900, and in the same year sold the equity of redemption directing the vendee to pay off the mortgagee. In November

1907 she adopted the plaintiff and died in December 1907. The vendee paid off the mortgage and obtained possession of the land in March 1908. The plaintiff sued to recover possession in December 1909. *Held* that the starting point of limitation under this Article was *not when the right of the plaintiff accrued* (November 1907) *but when the defendant's possession became adverse*. The defendant's (vendee's) possession did not become adverse until he obtained possession of the mortgaged property from the mortgagee (March 1908), for it was from this date that there was a clear indication in the shape of an overt act on the part of the vendee to indicate that he was asserting his rights under the sale-deed. The suit was therefore within time—*Hanamgowda v. Irgowda*, 48 Bom. 654, 26 Bom.L.R. 829, A.I.R. 1925 Bom. 9, 84 I.C. 374.

The possession of the defendant does not become adverse to the plaintiff until the latter is entitled to possession of the property. The general principle of the Act is that a person who had a right to enter should be barred if he does not exercise that right in a certain time, not that those should be barred who cannot exercise a right of entry. The maxim is—*contra non valentem agere non currit praescriptio*, that is, prescription does not run against a person who is unable to act. Darby & Bosanquet, p. 289. So, in a suit by an adopted son to recover property alienated by the adoptive mother before his adoption, it was held that, assuming that the possession of the alienee was adverse to the widow, that fact did not affect the plaintiff, who did not derive his right to sue from or through her and against whom the defendant's possession began to be adverse only after the adoption, when the plaintiff became entitled to possession—*Moro v. Balaji*, 19 Bom. 809 (816). In case of an adoption by a Hindu widow, limitation does not begin against the adopted son until the date of his adoption, and his right to his adoptive father's property is unaffected by possession adverse to the adoptive mother—*Hari Vithal v. Waman*, 2 Bom L.R. 411. See also *Harek Chand v. Bejoy Chand*, 9 C.W.N 795 (802). A Hindu died leaving a widow and a daughter. The widow alienated the properties for purposes not binding on the reversioners, and died in 1865. The alienees continued in possession of the lands to the exclusion of the daughter who died in 1901, and a suit was brought in 1912 by the reversioners for possession of the properties. It was held that Art. 144 applied, and the possession of the defendants (alienees) was adverse to the plaintiffs only on the death of the daughter when they became entitled to possession, and the suit was not barred by limitation—*Neelakanta v. Narayanaswami*, 31 M.L.J. 847, 37 I.C. 733. The last male owner of a certain property died leaving a widow and his mother. The widow alienated a portion of the land without necessity and placed the alienee in possession. She died in 1876. The mother afterwards died in 1892. The nearest reversioner died in 1903 without challenging the alienation or expressly assenting to it. In 1909 the reversioner next in succession to the deceased reversioner sued the alienee for possession of the land alienated. The defence was that the suit was barred by limitation. *Held* that the plaintiff's right to sue for possession was an independent right and not derived from or through the deceased reversioner.

and consequently the defendant's possession though adverse to the deceased reversioner could not be adverse to the plaintiff till he was entitled to possession in 1903, and the present suit instituted within 12 years from that date was in time under Article 144—*Sundar v. Salig Ram*, 26 P.R. 1911, (F.B.), 9 I.C. 300. On the same principle, adverse possession by a third party against the mortgagor does not become adverse to the mortgagee, until the latter is entitled to the possession of the mortgaged property (See Note 616 *ante*). So also adverse possession by a trespasser against the tenant does not become adverse to the landlord until after the expiry of the period of tenancy. See Note 613 *ante*. Similarly, adverse possession by a female entitled to a limited estate does not become adverse against the reversioners. See Note 620A.

The plaintiff obtained a decree in 1873 by which he became entitled to certain portions of land which were in the possession of the defendant, the actual boundaries of which were not defined by the decree but were ascertained in execution in 1876. The defendant continued in possession of some of the lands and the plaintiff had to file a fresh suit to get possession of them, to which the defendant pleaded limitation. It was held that limitation began to run when the boundaries of the lands were finally ascertained in 1876, and not from the date of the decree in 1873—*Jagajit v. Sarabjit*, 19 Cal. 159 (171) (P.C.).

Where certain chakran lands, which had been included in a *patni* mahal, were resumed by the Government and settled with the zemindar, and the patnidar brought a suit against the zemindar for possession of those chakran lands, *held* that the period of limitation for the suit ran not from the date when the Government settled the lands with the zemindar, but from the date when the zemindar's possession became adverse to the patnidar, *i.e.*, when some act was done by the zemindar indicative of a hostile attitude on his part towards the patnidar. The possession of the zemindar may become adverse to the patnidar in a variety of ways, *e.g.*, when the lands are settled by the Zemindar with tenants, or when the patnidar after being invited to come and take the lands does nothing and the Zemindar thereafter makes other arrangements either for holding the lands in *khas* or for settling the same with *ijardars* or the like. In each case the facts have to be investigated having regard to the language of Article 144—*Nagendrabala v. Bejoy Chand Mahatap*, 50 Cal. 577 (584), A.I.R. 1923 Cal. 734, 28 C.W.N. 114, 74 I.C. 153.

625. Burden of proof—In a suit falling under Article 144, what the plaintiff is required to establish is his *title* to the property. The plaintiff need not prove *possession*: it is not for the plaintiff to prove that he was in *possession* within 12 years prior to suit—*Sayad Nyamtula v. Nana*, 13 Bom. 424 (428); *Karan Singh v. Bakar Ali*, 5 All. 1 (6) (P.C.); *Sukhdeo v. Ram Dulari*, 29 O.C. 131, A.I.R. 1926 Oudh 313, 92 I.C. 825. It is only in cases falling under Article 142 that the plaintiff is required to prove possession within 12 years before suit. In cases under Article 144, the plaintiff may rest content with proof of *title* only in the first instance—*Kaki v. Babaji*, 14 Bom. 458; *Jai Chand v. Girwar*, 41 All. 669 (673).

The plaintiff's title may be presumed under certain circumstances. Thus, the admission by Government that they had paid rent for some years to the plaintiff is sufficient in law to raise a *prima facie* presumption of title in his favour, and the onus of proving that the land belonged to Government and that rent was paid to the plaintiff under mistake lies upon the Government—*Vithallas v. Secy. of State*, 26 Bom. 410.

After the plaintiff has established his title, his onus is discharged. He is not required to prove that his title *has not been extinguished* by the operation of limitation. It was held in *Inayet v. Ali Husein*, 20 All. 182 (185), *Secy. of State v. Vira Rayan*, 9 Mad. 175, *Secy. of State v. Bavotti*, 15 Mad. 315, and *Secy. of State v. Kota Bapanamma*, 19 Mad. 165, that in a suit under this Article, the plaintiff was required to prove not only a legal title to possession but also to prove by some *prima facie* evidence that he had a subsisting title *not extinguished* by the operation of the statute of limitation, before the defendant could be called upon to substantiate a plea of adverse possession. That is, the plaintiff was required to prove title *as well as possession* within 12 years prior to suit. But these decisions have been practically overruled by the Privy Council ruling in *Secretary of State v. Chellukani Rama Rao*, 39 Mad. 617 (631), in which their Lordships have observed: "The onus of establishing title to property by reason of adverse possession for a certain requisite period lies upon the person asserting such possession (i.e., upon the defendant). If it were not correct, it would be open to the possessor for a year or a day to say, 'I am here, be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions' It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession." In other words, when the plaintiff has established his title to land, the burden of proving that he has lost that title by reason of the adverse possession of the defendant lies upon the defendant—*Radha Gobinda v. Inglis*, 7 C.L.R. 364 (P.C.); *Karan Singh v. Bakar Ali*, 5 All. 1 (P.C.); *Kuthali v. Kunharankutti*, 44 Mad. 883 (891) (P.C.); *Inderpal v. Thakur Din*, 27 O.C. 77, A.I.R. 1924 Oudh 266, 78 I.C. 895; *Parmanand v. Sahib Ali*, 11 All. 438 (443); *Aluma v. Kutti*, 14 Mad. 96 (97); *Jobeda v. Tulshi Charan*, 36 C.L.J. 472, I.C. 564, A.I.R. 1923 Cal. 82; *Faki v. Babaji*, 14 Bom. 458 (462); *Vasudeo v. Eknath*, 35 Bom. 79 (91); *Syad Nyamtula v. Nana*, 13 Bom. 424 (428); *Chinto v. Janki*, 18 Bom. 51 (57); *Aluma v. Kutti*, 14 Mad. 96; *Ram Surat v. Badri*, 50 All. 89; *Jaichand v. Girwar Singh*, 41 All. 669 (671), 17 A.L.J. 814; *Kanhaiya v. Girwar*, 51 All. 1042; *Md. Amanulla v. Badan Singh*, 17 Cal. 137 (P.C.); *Radha Kanta v. Bhagawati*, 1 P.L.T. 192, 55 I.C. 247; *Gursahai v. Chhedi*, 27 O.C. 130, A.I.R. 1925 Oudh, 42, 79 I.C. 964; *Maung Aung v. Maung San*, 5 Rang. 576, 105 I.C. 598, A.I.R. 1928 Rang. 13; *Muthia Chetty v. Seena*, 12 Bur.L.T. 234, 56 I.C. 951. When it is found as a fact that the defendant had admitted the plaintiff's ownership up to a certain period, then before the defendant can set up adverse possession, he must show when the alleged adverse possession commenced

—*Tulshibai v Ranchhod*, 26 Bom 442 (444). When the possession of the defendant was in the beginning lawful and not inconsistent with the plaintiff's title, the burden lies on him to shew that his possession has assumed another character and has become inconsistent with the plaintiff's title—*Itappan v Manavikrama*, 21 Mad. 153 (159).

If the defendant fails to prove that he has been in adverse possession for more than 12 years, the plaintiff is entitled to succeed simply on the strength of his title. It is not necessary for him to go further and prove that he was in actual possession at some period within 12 years prior to the commencement of the suit—*Jaichand v. Gurnar Singh*, 41 All. 669 (670).

626. Invalid title cured by adverse possession :—If possession is acquired by a person under an invalid title and he continues to remain in possession for more than 12 years, although the document relating to his title may be invalid for want of registration or any other ground, yet the possession having lasted for more than 12 years, the title becomes an unassailable one. Therefore, where a party originally enters into possession under an *unregistered* sale-deed, and remains in possession for over 12 years, the defect of his title is cured by his having been in possession for the statutory period—*Mahipal v. Sarjoo*, 13 O.L.J. 326, 3 O.W.N. 100, 92 I.C. 99, A.I.R. 1926 Oudh 141; *Qadar Bakhsh v Mangha Mal*, 4 Lah. 249 (251), A.I.R. 1923 Lah. 495, 73 I.C. 889; *Ram Udit v. Bhagwat*, 95 I.C. 438, A.I.R. 1926 Oudh 500. So also, where the registration of a sale-deed is found to be illegal, the purchaser gets full title to the property purchased, if he is put in possession in pursuance of the sale-deed, and continues to be in possession for over 12 years, openly and adversely to the knowledge of the vendor—*Jasoda Kuar v. Nanak Missir*, 4 Pat. 394, A.I.R. 1925 Pat. 787, 7 P.L.T. 507, 92 I.C. 1034. Similarly, where the mortgagor surrendered his equity of redemption to the mortgagee but there was no deed of surrender, and the mortgagee remained in possession for 40 years, he acquired proprietary title to the property—*Bashir Husain v. Chandrapal*, 25 O.C. 83, A.I.R. 1922 Oudh 133, 68 I.C. 223. Where one brother executed a deed of relinquishment in favour of another, but the deed was never registered, and the brother in whose favour it was made remained in possession, held that the registered deed being insufficient to pass title, the possession taken under it must be held to be adverse and if it continued for more than 12 years, it was sufficient to create a title in favour of the person in possession—*Jhamplu v. Kutramani*, 39 All. 696 (698). A donee under an oral gift, which is invalid under the Hindu law, can perfect his title by possession for twelve years. If the donee is a female, the property becomes her stridhan—*Maluka Kunwar v. Pateswar*, 1 Luck. 273, 3 O.W.N. 536, 96 I.C. 672, A.I.R. 1926 Oudh 371, following *Varada Pillai v. Jeevaratnammal*, 43 Mad. 244 (250) (P.C.). Possession for more than 12 years under an unregistered perpetual lease perfects a title by adverse possession, though the deed itself is invalid—*Bank of Upper India v. Harnath*, 93 I.C. 852, A.I.R. 1926 Oudh 410. Where an adopted son held exclusive

of certain property for over the statutory period, and a reversioner subsequently sued for partition and possession on the ground that the adoption was invalid, *held*, assuming that the adopted son had an invalid title, he having been in exclusive possession, and the persons suing not being able to prove joint possession, the suit was barred—*Ishwari Prasad v. Hari Prasad*, 6 Pat. 506, 8 P.L.T. 34, A.I.R. 1927 Pat. 145, 106 I.C. 620. A grant made in contravention of sec. 12A of the Chota Nagpur Encumbered Estates Act is void, but if the grantee remains in possession for more than 12 years, he acquires a title by adverse possession—*Bageswari v. Jagannath*, 8 Pat. 549, A.I.R. 1929 Pat. 117 (120), 115 I.C. 699.

PART IX—Thirty Years.

145.—Against a de- Thirty The date of the deposit
positary or pawnee years. or pawn.
to recover moveable
property deposited
or pawned.

627. Scope :—According to some cases of the Calcutta High Court this article applies even though the moveable property is *not recoverable in specie*.—*Gangahari v. Nabin*, 20 C.W.N. 232 (233), 34 I.C. 959; *Lala Gobind v. Chairman*, 6 C.L.J. 535; *Jajneshwar v. Kailash*, A.I.R. 1929 Cal. 143 (144), 107 I.C. 473; *Administrator-General v. Krishto Kamini*, 31 Cal. 519 (affirming 7 C.W.N. 476). Therefore, the term "moveable property" as used in this Article includes money—*Lala Gobind v. Chairman*, 6 C.L.J. 535. So also, where the plaintiff made over to a goldsmith certain gold ornaments of the weight of one tola to be melted and made into new ornaments, and failing to get the ornaments on repeated demands instituted a suit for the return of one tola of gold or its price, *held* that this Article applied—*Gangahari v. Nabin*, (supra). But in the earlier case of *Issur Chunder v. Jiban Kumari*, 16 Cal. 25, it was held that the term 'deposit' meant a deposit of goods to be returned in specie. In another earlier Calcutta case also it was held that this Article applied only to a case of a deposit which was recoverable in specie, and therefore the Collector was not a depositary of the surplus proceeds of a revenue sale remaining in his hands—*Secretary of State v. Fazl Ali*, 18 Cal. 234 (241).

According to Madras, Panjab and Allahabad High Courts, this Article is applicable only to a deposit returnable *in specie*, and is inapplicable to a deposit of money—*Jasoda Bibi v. Parmanand*, 16 All. 256 (258); *Kalyan Mal v. Kishen Chand*, 41 All. 643 (645); *Balakrishnudu v. Narayanaswamy*, 37 Mad. 175 (177); *Ganesh Lal v. Chunni Lal*, 74 P.R. 1882; *Dalipa v. Labhu Ram*, 4 P.R. 1919, 65 P.L.R. 1918, 47 I.C. 592. In the Allahabad case of 41 All. 643, Walsh J. did not apply this Article even to a case of deposit of gold mohurs (which were to be returned *in specie*), but applied Article 60, on the ground that the mohurs were 'money.'

The right to officiate as priest at funeral ceremonies of Hindus is in the nature of *immoveable* property, and a suit to redeem a share of such right is governed by Article 148 and not by this Article—*Raghoo Panday v. Kassy*, 10 Cal. 73 (74).

628. Deposit :—Although the term 'deposit' ordinarily implies the deposit of specific property returnable in specie, it has a wider meaning. If a Government security or a sum of money is delivered to be held

as security for the performance of some engagement and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the engagement is fulfilled, the person with whom the deposit has been made will be treated as a depositary—*Lala Gobind v. Chairman*, 6 C.L.J. 535 followed in *Nand Lal v. Asutosh*, 55 I.C. 515 (Cal.); see also *Upendra v. Collector*, 12 Cal. 113 (115)

But a simple deposit of money for safe custody (and not to be kept as security for the performance of any work) does not fall under Art. 145 (but falls under Art. 60)—*Ganesh Lal v. Chunni Lal*, 74 P.R. 1882; *Balakrishnudu v. Narayanaswamy*, 37 Mad. 175; *Narmadabai v. Bhabani-shankar*, 26 Bom. 430 (so assumed); see also *Kalyan Mal v. Kishen Chand*, 41 All. 643 (645), 55 I.C. 45; *Jasoda v. Parmanand*, 16 All. 256 (258)

Where certain G. P. Notes were made over by the plaintiffs to the defendant to be kept by him in deposit on their behalf and if necessary to be used by him for raising funds for her own purpose, and the defendant sold all the notes, but had neither replaced them nor paid their value to the plaintiffs, *held*, that a suit to recover the value of those notes was governed by Art. 145, in as much as the transaction amounted to a deposit—*Administrator-General v. Krishto Kamini*, 31 Cal. 519 (528); in this case, Hill J. however was of opinion (see pp. 533, 536) that the transaction did not amount to a deposit, for an essential characteristic of a deposit properly so called was that the thing deposited should *not be used* by the deposittee, and that Article 145 would not apply, but Art. 49 would be the proper Article, or even Art. 115 or 120

The Madras High Court has held in *Balakrishnudu v. Narayanaswamy*, 37 Mad. 175 (178) that "the term 'deposit' should be taken to mean the sort of bailment known to lawyers under the name of 'depositum' in the Roman law of Bailments which was accepted by Lord Bracton and afterwards by Lord Hold in *Coggs v. Barnard*, (1703) 1 Sm. L.C. 173, as fit to be enforced in England. This depositum is a bailment of a specific thing to be kept for the bailor and returned when wanted, as opposed to *commodatum* where a specific thing as a horse or a watch is lent to the bailee to be used by him and then returned; and both are contrasted with *mutuum* where corn, wine or money or other things are given to be used and other things of the same nature and quantity are to be returned instead. In the Limitation Act, the word 'deposit' does not include so-called deposits of money or other things which are not intended to be kept but to be used." The same view seems to have been taken in *Gangineni Kondiah v. Gottipati Pedda*, 33 Mad. 56 (at p. 59) although it was not necessary for the decision of that case. Where the plaintiff deposited certain sum with the defendant at interest, and the defendant was not prohibited from using it nor was he bound to keep it invested in any particular way, and there was nothing to show that the defendant was a trustee of the fund, *held* that the defendant did not hold the money in deposit within Article 145—*Samuel v. Ananthanatha*, 6 Mad. 351 (352). The Madras High Court has also held that there can be no 'deposit' if

the thing deposited is not to be returned in the condition in which it would naturally remain at the time of return. Therefore, where the plaintiff gave certain loose rubies to the defendant, so that he might get them converted into an ear-ornament, it was held that the transaction was not a deposit—*Narayansamy v. Aiyasamy*, 24 M.L.J. 184, 18 I.C. 921. But in the recent case of *Kishtappa v. Lakshmi Ammal*, 44 M.L.J. 431, A.I.R. 1923 Mad. 578, 72 I.C. 842, the same High Court has laid down that the term deposit is used in Article 145 in a plain and simple language to mean simply that where one man's property is handed by that man to another, the latter becomes a depositary of it; it is not the intention of the Legislature that the Courts who have to administer the law should have to study either the case of *Coggs v. Bernard* or the Roman Law in order to ascertain what is the true meaning of Article 145, the term 'deposit' should not be confined to the strict meaning of *depositum* under the Roman Law, but also includes cases where a thing is handed over to a person on the understanding that the depositary might use the thing for his own benefit and then return it when demanded.

If ornaments, clothes and money are deposited with a person for safe custody, a suit to recover the ornaments and clothes (but not the money) falls under this Article—*Narmadabai v. Bhabanishankar*, 26 Bom. 430 (432).

A contract of bailment or deposit or pawn does not come to an end on the death of the bailee, depositary or pawnee, and the legal representative who succeeds to the estate of the deceased is bound by any contract to which the deceased was a party. Therefore a suit to recover a jewel from the legal representative of the original depositary falls under this Article and not under Article 48 or 49—*Krishnaswami v. Gopalachariar*, 20 L.W. 758, A.I.R. 1925 Mad. 185, 84 I.C. 1020.

The plaintiff handed over a jewel to the defendant to pledge it and raise loan on it for the plaintiff. Plaintiff paid off the loan, but the defendant who got back the jewel retained it, and refused to return it to the plaintiff. Held that as there was no agreement that the jewel should remain in deposit with the defendant after the repayment of the loan, this Article could not apply to a suit brought by the plaintiff to recover the jewel. The suit fell under Article 49—*Gopalasami v. Subramania*, 35 Mad. 636 (638), 12 I.C. 207.

629. Demand and refusal :—A suit for recovery of moveable property deposited is governed by this Article, and not by Art. 48 or 49, even though there has been a demand for the return of the deposit and a refusal by the depositary; limitation runs from the date of the deposit, and not from the date of refusal—*Narmadabai v. Bhabanishankar*, 26 Bom. 430 (432); *Gangineni Kondiah v. Kondappa*, 33 Mad. 56 (61); *Promotho v. Prodymno*, 26 C.W.N. 772, A.I.R. 1921 Cal. 416, 69 I.C. 900; *Gangahari v. Nabin Chandra*, 20 C.W.N. 232 (233), 34 I.C. 959. In England, however, time runs from the date of the demand, and no cause of action accrues until there is a demand and refusal—*Wilkinson v. Verity*, (1871) L.R. 6 C.P. 206; *In re Tidd*, [1893] 3 Ch. 154 (156).

630. Art. 145 and Art. 49 :—Article 145 is the *special* Article dealing with a suit against a depositary to recover moveable property deposited. Article 49 on the other hand deals *generally* with a suit for other specific moveable property, and has no application where the specific provision contained in Article 145 applies. Article 49 cannot be deemed to provide for the cases where the possession of moveable property is transferred to another by reason of a confidential relation such as is involved in a deposit—*Gangineni Kondiah v. Kondappa*, 33 Mad. 56 (57), *Promotho Nath v. Prodyumna*, 26 C.W.N. 772, 69 I.C. 900, A.I.R. 1921 Cal 416. Article 49 does not apply where there is a 'deposit' in any sense of the term—*Kishtappa v. Lakshmi Ammal*, A.I.R. 1923 Mad 578, 44 M.L.J. 431, 72 I.C. 842.

The Allahabad High Court is of opinion that in order to entitle the owner to sue for possession of the goods deposited or to recover damages for their loss, if they are not restored to him, he must make a demand. As there is an implied contract that they will be returned on demand, on failure to return them on demand, there is a breach of contract, and the owner may sue *in contract* in which case Article 145 will apply. On the other hand, the owner may sue *in tort*, owing to the unlawful withholding of the goods, and in that case Art. 49 would apply to the suit, being a suit for return of specific moveable property wrongfully detained—*Kaiyan Mal v. Kushen Chand*, 41 All 643, 55 I.C. 45. But all the other High Courts are of opinion that even though there is a demand for the goods and a refusal by the defendant, such refusal does not amount to a *wrongful detention* of the goods so as to attract the application of Art. 49. When goods are deposited, the article applicable is Art. 145; and this Article is not controlled by Art 49—*Ma Shwe v. Ma Saw*, 6 Rang. 547, 116 I.C. 468, A.I.R. 1928 Rang 309; *Narmadabai v. Bhawanishankar*, 26 Bom 430, 4 Bom L.R. 72; *Gangineni Kondiah v. Kondappa*, *supra*, *Kistappa v. Lakshmi Ammal*, *supra*, *Gangahari v. Nabin*, 20 C.W.N. 232 (233), 34 I.C. 959.

146.—Before a Court Thirty When any part of the principal or interest was last paid on account of the mortgage-debt.
 established by Royal years.
 Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged.

631. Where no part of the principal or interest has been paid, the extended period of limitation prescribed by this Article cannot be taken

advantage of, and the twelve years' rule will apply—*Ram Chunder v. Juggutmonmohini*, 4 Cal. 283.

This Article refers to suits instituted in High Courts; similar suits instituted in mofussil Courts are provided for in Article 135.

146A.—By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession. Thirty years. The date of the possession or discontinuance.

632. This Article does not apply where the suit is brought not by any local authority, but by a private person to oust the defendant from the road encroached—*Achar Singh v. Badhawa*, 124 P.R. 1912, 15 I.C. 285.

The "local authority" need not be the owner of the street or road. This Article cannot reasonably be restricted to streets or roads formed by the Municipality on lands belonging to or acquired by it in a *proprietary* right. For instance, when the Legislature has vested a street in a Municipal Council, such vesting does not transfer to the Municipal authority the right of ownership in the site or soil over which the street exists. Still, the Municipality has a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers, and such possessory suit would be governed by this Article—*Sundaram v. Municipal Council*, 25 Mad 635 (650).

The word 'road' in this Article, includes the portion which is used as a road as also the lands kept on both sides as parts of the road for the purposes of the road—*Anukul Chandra v. Chairman, Dacca District Board*, 32 C.W.N. 396 (398), A I R 1928 Cal 485, 113 I.C. 24.

If a person is in possession of the Municipal land for more than 30 years, the right of the Municipality to the land is extinguished—*Asutosh v. Corporation of Calcutta*, 28 C.L.J. 494, 49 I.C. 93, *Municipal Commissioners v. Sarangpani*, 19 Mad 154 (157). Where a person has his verandah encroaching upon the street lands for upwards of thirty years, the site becomes the property of the person to whom the verandah belongs by the operation of this Article read with section 28. In such a case, it is no longer competent to the District Municipality to direct him to give up possession of the encroached lands under sec. 122 of the Bombay District Municipal Act (III of 1901), because it is no longer a public street, but the private property of the defendant—*Tayaballi v. Dohad Municipality*, 22 Bom L.R. 951, 58 I.C. 326.

In a Madras case, Bhashyam Ayyanger J. has made a fine distinction (known to English law and Scotch law) between the ownership of the Municipality over the land, and the ownership of the Government over the land, and made the following observations as to the effect of Article 146A and sec 28 on this divided ownership: "The operation of sec. 28 upon this Article would be to extinguish the right of highway on the expiration of 30 years from the date of dispossession of the Municipality by encroachment, and thus free the land from the burden of the highway, if the person encroaching upon the land be the owner of the land. If the owner of the land on which the highway exists be a third party, an encroachment of a permanent character on the public highway will also, as a general rule, operate as occupation of the soil and dispossession of the owner of the soil equally with the Municipality, and his ownership will be extinguished in favour of the trespasser at the expiration of the ordinary period of limitation viz 12 years, and at the expiration of 30 years, the ownership thus acquired by the wrongdoer will be freed from the burden of the highway. But if the highway has been dedicated to the Municipality by the Crown, the right of the Crown can only be extinguished at the expiration of 60 years' adverse possession or occupation by the trespasser. Therefore in cases in which the site of the street belongs to the Crown, the Municipality will be barred after the expiration of 30 years from the date of its dispossession, but the Crown will have the land freed from the burden of the highway and will be entitled to remove the obstruction or encroachment, and after removing the same, it may again dedicate as a highway the portion of land thus freed from the burden. But if it suffers the obstruction to continue for a further period of 30 years, the trespasser would become the absolute owner of the land"—*Sundaram v. Municipal Council*, 25 Mad 635 (650, 651); *Basaweswaraswamy v. Bellary Municipal Council*, 38 Mad. 6 (11).

The period of limitation for a suit for ejectment of a trespasser who has encroached upon the municipal road, commences from the time the encroachment is made, and there is no continuing wrong so as to entitle the plaintiff to the benefit of sec 23. The wrong is complete as soon as the encroachment takes place—*Municipal Commissioners v. Sarangapani*, 19 Mad 154 (157), *Ashutosh v. Corporation of Calcutta*, 28 C L J. 494, 49 I C 93.

PART X—Sixty Years.

147.—By a mortgagee Sixty When the money secur-
for foreclosure or years. ed by the mortgage
sale. becomes due.

633. English Mortgage —It was laid down by the Privy Council (overruling a large number of cases) that Article 147 of the Limitation Act applied to the one class of mortgage in which alone a suit could be and always was brought for "foreclosure or sale" (i.e., foreclosure or sale *in the alternative*, and not distributively) viz. to English mortgages; it did not apply to suits on simple mortgages, these are governed by Art 132 *Vasudeva v Srinivasa*, 30 Mad 426 (P C). But under sec. 67 clause (a) of the Transfer of Property Act as recently amended by the T. P. Amendment Act (XX of 1924), the right of foreclosure has been taken away from English mortgages, so that Art 147 can no longer apply to such mortgages. They now stand on the same footing as simple mortgages allowing only a suit for sale, and the only Article applicable to such suit is Art 132.

As the only class of mortgage in which a suit for "foreclosure or sale" was allowed has now been deprived of the remedy of foreclosure, and there is no other class of mortgage in which such alternative relief is available, the words "or sale" should be omitted from this Article. It would then apply to suits for foreclosure under mortgages by conditional sale, and under anomalous mortgages the terms of which expressly provide for foreclosure. As at present worded, this Article has no application to any kind of mortgage-suit whatsoever.

634. Mortgage by conditional sale :—A suit to recover money due under a mortgage by conditional sale, or for foreclosure, is governed by Art. 132, not by Art. 147—*Sheoram Singh v. Babu Singh*, 48 All. 302, 24 A L J 295, A I.R. 1926 All 493, 94 I.C. 849; *Balaram v. Mangta*, 34 Cal 941 (1945) (S B).

635. Usufructuary mortgage .—A usufructuary mortgagee cannot institute a suit either for foreclosure or for sale. But if the usufructuary mortgagee does not obtain possession under the mortgage, a suit to recover the money by sale of the property (treating the mortgage as a simple mortgage) is governed by Art 132, not by Art 147—*Rama Chandra v. Modhu*, 21 Mad 326 (332) (F.B.).

636. Equitable mortgage :—A suit to recover money due under an equitable mortgage is now provided by Article 132, Explanation, clause (c), newly added by the Transfer of Property Amendment Supplementary Act XXI of 1929 and the period of limitation is 12 years. See Note 558 under Art. 132. The ruling in *Manekji v. Rustomji*, 14 Bom. 269 (272, 273), where it was held that the mortgagee by deposit of title-

deeds had a right to sue for foreclosure or sale within 60 years under Art. 147, is no longer good law.

148.—Against a mortgagee to redeem or to recover possession of immoveable property mortgaged. Sixty years. When the right to redeem or to recover possession accrues.

Provided that all claims to redeem arising under instruments of mortgage of immoveable property situated in Lower Burma which had been executed before the first day of May 1863 shall be governed by the rules of limitation in force in that province immediately before the same day.

637. Suits under this Article :—A right to officiate as priest at funeral ceremonies of Hindus is in the nature of immoveable property and a suit for redemption of such right therefore falls under this Article and not under Art. 145—*Raghoo Pandey v. Kassy*, 10 Cal. 73 (74)

*Suit by purchaser from mortgagor :—*A purchaser of the equity of redemption in part of the mortgaged property is entitled to redeem his own portion of the property, within 60 years from the date of the mortgage. All persons who have stepped into the shoes of the mortgagor are mortgagors for all purposes, and this Article is applicable to a suit by a purchaser of the equity of redemption in a part of the mortgaged property—*Wazir Ali v. Ali Islam*, 40 All. 683 (685).

*Suit against mortgagee's assigns :—*A purchaser who purchases the mortgaged property from the mortgagee upon the representation and in the belief that it was an absolute interest that he was purchasing, is a transferee for valuable consideration, and a suit by the mortgagor to recover the property from such purchaser is governed by the shorter period of limitation provided by Article 134 (See Note 363 under Article 134). But where the purchaser has knowledge that he was purchasing the limited interest of a mortgagee, i.e. where he simply takes a transfer of the mortgage, a suit against him is governed by Art. 148, not by Art. 134—See *Drigpal v. Kallu*, 37 All. 660; *Muthu v. Kambalinga*, 12 Mad. 316; *Bhagwan Shahai v. Bhagwan Din*, 9 All. 97, and other cases cited at page 559 ante.

*Redemption of occupancy holding :—*A mortgage of an occupancy holding is not permitted by law, but by entering into possession as mort-

gagee and continuing in such possession for more than 12 years, the mortgagee can only prescribe a title for the limited interest of a usufructuary mortgagee. A suit by the mortgagor against the mortgagee for possession of the holding is a suit for redemption under this Article, and time runs from the date of the mortgage—*Maha Mangal v. Kishun*, A.I.R. 1927 All. 311, 100 I.C. 346.

Second suit for redemption:—Where a mortgagor brought a suit for redemption and obtained a decree, and about twenty-three years after the date of the decree, applied to execute the decree and prayed that this application be treated as a suit, *held that* as the decree was not executed, the relationship of mortgagor and mortgagee did not cease to exist between the parties, and the present application though barred under sec 48 C. P. Code could be treated under sec 47 C. P. Code as a fresh suit for redemption, if the period prescribed by Article 148 had not then expired—*Hanmant v. Shidu Shambhu*, 47 Bom 692 (695), A.I.R. 1923 Bom. 300, 25 Bom L.R. 358, 72 I.C. 556 See also *Muhamdi Began v. Tufail*, 48 All. 17, A.I.R. 1926 All. 20, 92 I.C. 260.

Claim for surplus profits received by mortgagee:—See 26 C.W.N 123 cited in Note 452 under Article 105.

Suit by puisne mortgagee to redeem prior mortgage:—As to whether Art. 148 or Art. 132 applies to a suit by a puisne mortgagee to redeem a prior mortgage, where both mortgagees have brought suits on their respective mortgages and purchased the property in execution of their decrees, see 47 M.L.J 602, 14 C.W.N 439, 5 Pat 513, and other cases cited in Note 553 under Art 132, where the subject has been very fully discussed.

Suit against redeeming co-mortgagor.—See Note 623 in Article 144, under sub-heading "suit against redeeming co-mortgagor."

638. Suits not under this Article :—

Invalid sale of equity of redemption.—Where a mortgagee in possession gave the mortgaged property in lease to the mortgagor, and in execution of a decree against the mortgagor for arrears of rent in respect of the lease, attached the mortgaged property and brought it up to sale in contravention of sec. 99 (old) Transfer of Property Act, and purchased it himself, the sale is voidable and not void, and the mortgagor cannot successfully maintain a suit for redemption of the property without first getting the sale set aside (Art 12) Even if in such a case the mortgagee-purchaser is treated as a trustee of the equity of redemption for the mortgagor, the suit by the mortgagor cannot be regarded as a suit for redemption under Article 148, but a suit to enforce a trust under Article 120—*Uttam v. Rajkrishna*, 47 Cal. 377 (396) (F B), 24 C.W.N. 229.

Suit on subsequent agreement:—Where after the expiration of the term of a mortgage, the mortgagor and mortgagee agreed that the mortgagee should continue in absolute possession for a fixed term in satisfaction of the debt and then restore the property free from the mortgage-

lien; it was held that the agreement was distinct from the original mortgage, and was not intended to be a mortgage but a conveyance for a term of years, and a suit to recover the property does not fall under this Article but must be brought within 12 years from the expiration of the term stipulated in the agreement—*Gopal v. Desai*, 6 Bom. 674 (680).

Suit for accessions:—Where a mortgagor after redemption sues to take over accessions made by the mortgagee, the suit is not one really for redemption. The redemption being already completed, the relationship of mortgagor and mortgagee no longer subsists, and the subsequent suit for accessions is not a suit against a 'mortgagee' under this Article but a suit for possession under Article 144—*Khudadad v. Girdhari*, 163 P.W.R. 1917, 42 I.C. 468.

Adverse possession by mortgagee:—See Note 614 under Art. 144.

639. Interest.—The mortgagee is entitled to interest for the whole period. Where interest is a charge on the property, the mortgagor cannot get a decree for redemption without paying all the money (principal and interest) for which the property sought to be redeemed is a security. The mere fact that if the mortgagee as plaintiff had brought a suit for recovery of interest, he could not recover interest for more than six years or 12 years before that suit, would not preclude the mortgagee from claiming (as a defendant) interest for the whole period, in a suit for redemption brought by the mortgagor. The law of limitation does not apply to a plea raised in defence—*Akbar v. Ragnandan*, 8 P.L.R. 1921, 57 I.C. 348 (349), *Kamra v. Bishambar*, 147 P.R. 1890 (F.B.); *Hoshnakmal v. Sohna Mal*, 114 P.R. 1894; *Ghasita v. Ishar*, 8 P.R. 1890. As to *post diem* interest, see Note "Interest after due date" under Art. 116.

640. Laches.—The mortgagee can exercise his right of redemption at any time within the period of 60 years which the law allows him under this Article, and no Court of Justice would be justified in diminishing that period on the ground of his laches in the prosecution of his rights—*Juggernath Sahoo v. Syed Shah Mahomed Hossein*, 23 W.R. 99 (P.C.); *Pokhpal v. Bishan*, 20 All. 115 (117); *Kishori Mohun v. Ganga Bahu*, 23 Cal. 228 (237). If the right of action is subject to a statutory limitation, laches does not have the effect of shortening the term within which the plaintiff can sue. A party cannot be said to be in delay because he takes advantage of the full period which the law allows, and does not bring his action until that period is on the point of expiring. *Lightwood*, p. 254.

641. Starting point of limitation:—The right of redemption and the right of foreclosure are co-extensive. Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period—*Bakhtawar Begum v. Husaini*, 36 All. 195 (199) (P.C.); *Vadju v. Vadju*, 5 Bom. 22; *Husaini v. Husain*, 29 All. 471 (473); *Raghubar v. Budh Lal*, 8 All. 95 (98); *Tirugnana Sambandha v. Nallatambi*, 16 Mad. 486 (489); *Setti*

Kethi v. Kuthi Pathumma, 40 Mad. 1040 (1062), *Brown v. Cole*, 14 Sim. 427. In *Bhagaut v. Parshad Singh*, 10 All 602 (609), *Rose Arimal v. Rajaratnammal*, 23 Mad. 33 (35, 36) and *Sri Setrucherla v. Sree Raja Varicherla*, 2 Mad 314 (316) it has been held that there is no general rule of law which precludes a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made. But these decisions are no longer correct, in view of the authoritative pronouncement of the Judicial Committee in *Bakhtawar Begum v. Husaini Khanam* (supra), and by reason of the recent amendment of sec. 60 Transfer of Property Act (by the Amendment Act XX of 1929). But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt at any time during the specified period and take back the property. So, where a mortgage by conditional sale provided that the mortgage was for 9 years, but that the mortgagor would be entitled to get back the property whenever the mortgage money would be satisfied out of the usufruct or paid by the mortgagor whether before or after the stipulated time of 9 years, and it happened that the mortgage-debt was satisfied by the usufruct in three years after the mortgage, it was held that time ran from the satisfaction of the mortgage-debt i.e. from the end of the third year and not after the expiration of 9 years—*Bakhtawar Begum v. Husaini*, 36 All 195 (199) (P C)

Where a mortgage by conditional sale provided that if at any time within seven years from the date of the mortgage the vendors would pay a stated sum to the vendee, the latter would reconvey, it was held that the time for a suit for redemption did not begin to run until after the expiration of the seven years, as it was not obligatory upon the mortgagors to pay the money before that time—*Kalka Prasad v. Bhuiyan Din*, 31 All. 300 (303)

Where a usufructuary mortgage provides for the mortgagee paying himself the debt (both principal and interest) from the rents and profits of the estate and for the surrender of possession when the debt is so paid off, and no time is fixed for redemption, the mortgagor is not entitled to bring a suit for redemption before the mortgage-debt is wholly satisfied out of the rents and profits—*Tirugnana Sambandha v Nallatambi*, 16 Mad 486 (490). But where a usufructuary mortgage provides that the profits are to be taken by the mortgagee in lieu of interest only, and that the mortgagor would be entitled to redeem and obtain possession on payment of the principal sum, and no date for redemption is specified, the right to redeem the mortgage accrues to the mortgagor immediately from the date of execution of the mortgage—*Sonu Ram v. Kanhaiya Lal*, 35 All 227 (230) (P.C.) If there was an express provision in a usufructuary mortgage that the mortgage was redeemable at any time at the will of the mortgagor, the mortgagor's right to redeem accrued on the date of the mortgage—*Anwar Husain v. Lalmir*, 26 All 167 (171). In case of a *lekha mukhi* mortgage (a usufructuary mortgage by which the land is made over to the mortgagee who has to look to its produce for the payment of his debt, principal and interest, and in which the mortgagor undertakes no personal responsibility, and the mortgagee is not

entitled to sue for the debt), the right to redemption accrues immediately from the date of execution of the mortgage, and time runs from that date—*Khundu Lal v. Fazal*, 1 Lah 89 (91); *Dittu Mal v. Ilahi*, 28 P.L.R. 123, 101 I.C. 549, A.I.R. 1927 Lah. 828.

If there is an acknowledgment of the mortgage by the mortgagee, the period of 60 years will run from the date of such acknowledgment—*Vithu v. Keshav*, 6 Bom.L.R. 38; *Anwar v. Lalmir*, 26 All. 167 (172).

But a payment of interest by the mortgagor or the receipt of the profits of the mortgaged property by the mortgagee does not extend the period of redemption, though it will extend the period in respect of the mortgagee's suit to bring the property to sale—*Anwar v. Lalmir*, 26 All. 167 (169); *Kallu v. Halki*, 18 All. 295; *Bhagwan v. Madhab*, 46 Bom. 1000, A.I.R. 1922 Bom. 356, 70 I.C. 906. See Note 204 under sec. 20.

149.—Any suit by or on behalf of the Secretary of State for India in Council, *except a suit before the Federal Court in the exercise of the original jurisdiction.* When the period of limitation would begin to run under this Act against a like suit by a private person, *except a suit*

642. Scope of Article.—Under the Act of 1871, this Article referred to suits “in the name of” the Secretary of State, but in the Acts of 1877 and 1908, the words “in the name of” have been changed into “by or on behalf of.” Under the Act of 1871, this Article applied to suits by private persons for their own benefit in the name of the Secretary of State; under the Acts of 1877 and 1908 such suits will no longer fall under this Article. The present Article applies only to suits which are brought for the benefit of or on behalf of the Government and it would seem as if it was necessary that the suit should be actually in the name of the Secretary of State—*Starling*, 5th Edn., p. 446.

It is inapplicable to suits brought by persons claiming through Government, as for instance, to suits by persons claiming title under *pattas* from Government—*Jagadindra v. Hemanta*, 32 Cal. 129, (139) (P.C.); *Madhava v. Lokenatha*, 5 M.L.T. 107, 2 I.C. 314; *Assomeah v. Rajoo Mia*, 10 W.R. 76; *Moolchand v. Amarnath*, 140 P.L.R. 1917, 39 I.C. 971; *Raghoonath v. Govind Chander*, 14 W.R. 170; or to suit by purchasers from Government—*Kuthaperumal v. Secretary of State*, 30 Mad. 245 (248); *Annada Mohan v. Kina Das*, 28 C.W.N. 66, 81 I.C. 675. A.I.R. 1924 Cal. 394; *Nawab Bahadur v. Gopinath*, 13 C.L.J. 625, 6 I.C. 392; *Brindaban v. Bhoopal*, 17 W.R. 377; *Hossein Buksh v. Ameen*, 20 W.R. 231; *Bundee Roy v. Pundit Bunsee*, 24 W.R. 64. Therefore, where a purchaser of land from Government sued to recover possession within 60 years but more than 12 years from the commencement of adverse possession, though within 12 years from his purchase, held that the suit was barred under Article 144, Article 149 not applying to the case. The period of limitation was 12 years, and the period of adverse posses-

sion which had already run against the plaintiff's predecessor-in-title (Government) should be reckoned against the plaintiff—*Annada Mohan v. Kina Das*, (supra). Even if the plaintiff (assignee from Government) in such a suit joins the Secretary of State as a co-plaintiff, the period of limitation for a suit for possession will not be sixty years under this Article, but 12 years—*Pullanapalli Sankaran v. Vittil Thalakat*, 28 Mad. 505 (506). In *Kylashbhashini v. Gocoolmoni*, 8 Cal. 230 (235), there was a *dictum* that a person claiming under Government (e.g. an auction-purchaser from Government) could sue within 60 years under this Article. But this is no longer good law in view of the Privy Council decision in 32 Cal. 129 cited above.

A Municipality is not entitled to claim the benefit of this Article. The reason is that, when the Government has ceded land to a Municipal Corporation, it cannot, with the land, cede any right or privilege inherent in the sovereign power. Consequently the Municipality cannot, in a suit brought by it, claim the benefit of sixty years' rule, but the ordinary rule of limitation will apply—*Municipal Commissioners v. Sarangopani*, 19 Mad. 154 (156). That is, the learned Judges in this case laid down that after the Government had once vested a land in the Municipality, the Government would lose all right of proprietorship in the land by virtue of adverse possession of the land by a trespasser for the period of 30 years under Article 146A (or 12 years under Article 142, before Article 146A was enacted). But this view has been dissented from by Bhashyan Ayyangar J. in *Sundaram v. Municipal Council*, 25 Mad 635, where his Lordship has laid down that a Municipal Council does not, by the vesting of a street in it, become the full owner of the site or soil on which the street exists, and that although adverse possession by a trespasser for 30 years (Art 146A) may extinguish the right of the Municipality over the land, the title of the Crown to the land will not be lost until the trespasser has had possession for 60 years (Article 149).

This Article applies only to suits brought by or on behalf of Government; it does not apply to a suit brought by a private person against the Government—*Secretary of State v. Bavotti*, 15 Mad 315 (318)

This Article applies only to suits and not to *appeals* or applications, appeals by the Crown against acquittals are especially provided for in Article 157, and applications by Government are subject to the same period of limitation which is applicable to a private individual—*Appaya v. Collector*, 4 Mad. 153 (156). An *application* by Government under the Bengal Resumption of Revenue Regulation (II of 1819) is not a suit, so as to make Article 149 applicable—*Mahabannissa v. Secretary of State*, 53 Cal. 561, A.I.R. 1926 Cal 1064, 98 I.C. 334

643. Suits under this Article :—Where a zemindar sold a ghatwali mahal as a mal mahal, and not merely his right to receive the quit rent from the ghatwal, and the vendee in collusion with the former ghatwal granted him a mokurari tenure, thus changing the nature of the tenure from a ghatwali to a mal tenure, a suit by the Government to

maintain its own nominee in possession of the land as gharwal falls under this Article—*Petumber v. Jugurnath*, 18 W.R. 130 (131).

A suit by Government for possession of a plot of land encroached upon by the defendant falls under this Article, and is in time if brought within 60 years from the date of the encroachment—*Ranchodlal v. Secretary of State*, 35 Bom 182 (189), 9 I.C. 768.

A suit for possession by Government under sec. 9 Specific Relief Act is governed by Article 149, and not by Art. 3—*Secretary of State v. Dinshaw*, A.I.R. 1925 Sind 275, 87 I.C. 1002.

A suit for resumption of *lakhiraj* land by Government falls under this Article and will be barred if the defendant was in possession of the land for more than sixty years before suit. Such suit by a private person would be governed by Article 130. See *Koylashbasini v. Gocoolmani*, 8 Cal 230 (236).

A suit by Government to assess revenue on land alleged to be *lakhiraj* is subject to the limitation under this Article and would be barred if the owner can prove 60 years' possession of it without payment of any revenue—*Annada v. Secretary of State*, 43 Cal 973 (979).

644. Adverse possession against Government:—The period of limitation against the Government being 60 years, a person can convert his possession into an absolute title as against the Government, only by proving possession for 60 years. Possession which falls short of this period is insufficient to create a title. Mere evidence of long possession is not sufficient—*Kodoth Ambu Narayan v. Secretary of State*, 47 Mad 572 (582) (P.C.); *Krishna v. Singaravelu*, 48 Mad. 570, 91 I.C. 130, A I R 1925 Mad 780, *Abdut Wahed v. Secretary of State*, 7 Lah. 210, 96 I.C. 457, A.I.R. 1926 Lah 437. *Secretary of State v. Chellikani Rama Rao*, 39 Mad. 617 (629) (P.C.), *Bank of Upper India v. Secretary of State* 33 All 229 (232). The possession of a person for a period of 12 years, though it would be sufficient to bar a claim by any other party, would not exclude a claim by the Crown to recover what could be shown to be Government property—*Secretary of State v. Durbijoy*, 19 Cal 312 (321) (P.C.)

As long as a property remains in cantonments, it must be regarded as land held for Government under the Government regulations and under the control of the military authorities; and no person can acquire title thereto by adverse possession. It is only when the property is handed over to the civil authorities that adverse possession may be set up for the first time—*Bank. of Upper India v. Secretary of State*, 33 All. 229 (231, 232).

In case of forests and immemorial waste lands, where the presumption is in favour of ownership of Government, the acts of adverse possession relied on by the claimant must be acts of undoubted ownership, such as the granting of leases to tenants for cultivation and the cutting of valuable trees for sale, and not such paltry acts as taking firewood, leaves and twigs and small trees and other acts which the

Government permits in forests and waste lands for the benefit of the adjacent cultivation—*Secretary of State v Krishnayya*, 28 Mad. 257 (298).

Where it was proved that a pucca thatched building had been erected and was in existence for a period of over 60 years and that the plaintiff had used the same openly for the purpose of tethering cattle and storing hay, etc., it also appeared that the site had been enclosed by a *Kalli* fence all round, *held* that the acts of user were sufficient to constitute title by adverse possession. *Held* also that the fact that the Government had issued tree patta for stray trees on the suit land and that it had levied assessment for the same cannot alter the character of the possession of the plaintiff—*Secretary of State v Muthukumara*, 25 L.W. 349, A.L.R. 1927 Mad 456, 101 I.C. 96

Presumption and burden of 'proof' :—Where a suit was brought by the Crown for incorporating certain lands into a reserve forest under the Madras Forest Act, such lands being certain islands formed in the bed of the sea, near the mouth of a tidal navigable river, and within 3 miles from the main land, and the defendant pleaded that he had acquired a title to the property by adverse possession, *held* that the Crown was *prima facie* the owner of the islands (which were jungle lands) and the onus lay on the defendant to prove that he had acquired a title by adverse possession for more than 60 years, it does not lie on the Crown to shew that the defendant's adverse possession commenced within 60 years before the suit—*Secretary of State v Chellikani Rama Rao*, 39 Mad 617 P.C. (reversing *Chellikani Rama Rao v Secretary of State*, 33 Mad 1) In 33 Mad 1 (4, 5), it was held by the Madras High Court that if the lands came into existence as lands capable of occupation more than 60 years prior to the notification under sec 4 of the Mad. Forest Act and defendant could prove that he was in possession of these islands, say, for 20 years prior to the notification, the presumption would be that he was in possession for 60 years, and the burden would lie on the Crown to prove that it had a subsisting title by showing that the defendant's possession commenced or became adverse within the period of limitation, that is, within 60 years before the notification, it would not be necessary for the defendant to prove adverse possession for 60 years. But the Privy Council in 39 Mad 617 (633, 634) overruled this view and remarked "The objectors to afforestation (defendants) preferring claims are in the same position as persons bringing a suit for a declaration of their right and in such a suit the onus of establishing possession for the requisite period would lie on those persons. The view of the High Court is erroneous. It is an undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental, until adverse possession against the Crown is complete, that is, for the period of sixty years, that fundamental fact remains. And it is no part of the obligation of the Crown to fortify their own fundamental right by any inquiry into possession or the acceptance of any onus on that subject."

In some earlier Madras cases it has been held that the presumption under the Madras Forest Act is that all unoccupied land is at the disposal

of the Government; but if the land be really occupied when a notification is published under sec. 4, it will be a ground for presuming that the occupant is the *prima facie* owner and for shifting the onus on to the Government. Thus, if the claimant starts with an admitted possession and enjoyment for, say, 30 years, the onus is certainly shifted to the Government; the Government cannot compel the claimant to prove 60 years' possession but must show a subsisting title of its own—*Secretary of State v. Kota Bapanamma*, 19 Mad. 165 (166), *Secretary of State v. Bavotti*, 15 Mad 315 (317, 321). These cases must be deemed as overruled by the Privy Council in 39 Mad 617 cited above. See the remarks of Walsh J in *Jaichand v. Girwar*, 41 All. 669 (at p. 671).

In the district of Malabar, and in tracts admitted as part of it, there is no presumption that forest lands are the property of the Crown; consequently, it is incumbent on the Crown either to show possession of the proprietary rights claimed within 60 years, or if the defendants prove possession, to show that the possession of the defendants commenced or became adverse within 60 years before suit—*Secretary of State v. Vira Rayan*, 9 Mad 175 (184). This case has been distinguished by their Lordships of the Judicial Committee in 39 Mad. 617 (632), owing to the peculiarity of Malabar law.

Where there is evidence both oral and documentary to show that the claimants had for a period beyond living memory or at least for fifty years uniformly asserted their rights to the forest tracts, and there was no evidence to prove that before the challenge which led to the present litigation there was any similar assertion of right on the part of the Government, the presumption was that the claimants were in possession for more than 60 years, and have acquired a title by prescription—*Sivasubramaniya v. Secretary of State*, 9 Mad 285 (303, 307), affirmed by the Privy Council in *Secretary of State v. Siva Subramania*, 15 Mad. 101 (109).

In a suit against Government for possession of lands other than forest lands, if it is found that the plaintiff has proved possession for more than 12 years (say for 30 or 40 years) and the defendant (Crown) has failed to establish his title to the land or any possession within 60 years before suit, it will be presumed that the plaintiff has held possession for 60 years, and the burden will be thrown upon the defendant (Crown) to prove that he (Crown) has a subsisting title—*Krishna Aiyar v. Secretary of State*, 33 Mad 173 (175). In the above Privy Council case (*Secy of State v. Chettikani Rama Rao*, 39 Mad 617) the lands were jungle lands, and the presumption was that the lands *prima facie* belonged to the Crown and the onus was thrown upon the claimants, but in this case, (33 Mad 173) the lands not being forest lands, no such presumption was made in favour of the Government.

Where the plaintiff and his predecessors-in-title have been in possession of the plaint land for more than thirty years, previous to the suit, the presumption is that they were in possession prior to that time also, unless it is proved on behalf of Government that the land was unoccupied land or land in the occupation of Government before. When possession for a

certain period is shown, it will be open to a Court deciding the facts to presume that possession prior to that period was also in the party whose subsequent possession is proved—*Narayana Pillai v. Secretary of State*, 23 M.L.J. 162, 15 I.C. 257, *Venkatarama v. Secretary of State*, 33 Mad 362.

Where it was found that certain hills (the property in dispute) were within the immemorial boundaries of the village of the claimant, and he was in actual possession of the hills, and on the other hand, there was on behalf of Government nothing to meet or contradict the above evidence as to the possession of the claimant, *held* that the claimant had made out a strong *prima facie* title backed up by possession, and it did not lie on him to prove adverse possession as against Government. It lay on the Government to establish their title, if any—*Nawab Ajajuddin v Secretary of State*, 28 Mad 69 (71)

Where it is admitted or proved that the title to the property lay with the Government, and the plaintiff sues for a declaration that he has by prescription become the owner of the property, the suit must fail unless the plaintiff is able to show that he has been in adverse possession for more than 60 years. Until that period has elapsed, the Government's right in the property is not lost by section 28—*Abdul Waheb v Secretary of State*, 7 Lah. 210, 96 I.C. 447, A.I.R. 1926 Lah 437; *Secretary of State v Sreeramamurthi*, 22 L.W. 546, 91 I.C. 179, A.I.R. 1926 Mad 125

SECOND DIVISION : APPEALS.

150.—Under the Code Seven The date of the sentence of Criminal Procedure 1898, from a sentence of death passed by a Court of Session.

150A.—Under the Seven The date of the finding. Code of Criminal days. Procedure 1898, from a finding rejecting a claim under section 443 of that Code.

This Article has been added by the Criminal Law Amendment Act, XII of 1923

151.—From a decree or Twenty The date of the decree order of any of the days. or order. High Courts of Judicature at Fort William, Madras, Bombay, Lahore and Rangoon in the exercise of its original jurisdiction.

645. The date of the decree is the date on which judgment is pronounced (O. 20, r 7, C P Code)—*Ramey v. Broughton*, 10 Cal 652 (660), *New Piecegoods Bazar Co v Jivabhai*, 15 Bom.L.R. 681, 20 I.C. 537 (538) The decree of the High Court in its original side should bear the same date as the judgment, and limitation should not be calculated from the date when the decree was signed by the Registrar—*Haje Abobuckor v. Official Assignee*, 25 M.L.J. 560, 21 I.C 545

An appeal in a suit under the Indian Divorce Act (IV of 1809) fails under this Article—*A. v. B.* 22 Bom 612.

The 'decree or order' includes a 'judgment' in the sense in which that word is used in the Letters Patent (Rangoon), therefore the period of limitation for an appeal under clause 13 of the Letters Patent from a

judgment of the High Court (original side) is 20 days as prescribed by this Article—*J. N. Surty v. T. S. Chettiar Firm*, 4 Rang. 265, 98 I.C. 417, A.I.R. 1927 Rang. 20; *Ariff v Perumal*, 5 Bur.L.J. 75, A I R 1926 Rang. 143, 98 I.C. 689.

The duty to file a requisition for drawing up a decree in the original side of the High Court is primarily cast on the plaintiff, and where he has filed the requisition within 4 days (according to High Court Rules) the period required by the plaintiff for drawing up the decree should be excluded in favour of the defendant-appellant in computing the period of limitation for his appeal against the decree, if he has been otherwise diligent. And the defendant cannot be said to be wanting in diligence in not having insisted upon the decree being filed sooner, when the plaintiff was taking unnecessary time in getting the decree drawn up; because, when the requisition for drawing up the decree has been filed by the plaintiff, the defendant is not called upon to interfere in the process of the drawing up of the decree—*Sambhu Nath v Gopi Lal*, 56 Cal 709, A.I.R 1929 Cal 734 (735), 121 I C 307

152.—Under the Code of Civil Procedure, 1908, to the Court of a District Judge. The date of the decree or order appealed from. Thirty days.

646. This Article must be read with O XX, r 7, C P Code, and the "date of the decree" for the purpose of calculating the time for appeal must be taken to be the day on which the judgment is pronounced—*Narayanswamy v Krishnasami*, 25 I C 67 (Mad)

Where a decree is amended after it is passed, and the appeal is directed against the amendment, the period of limitation for appeal will be counted from the date of the amendment. But if the grounds of appeal have no relation to the amendment, the period of limitation will run from the date of the decree and not from the date of amendment—*Brojo Lal v Tara Prosanna*, 3 C L J. 188, *Parameshwara v. Seshagiriappa*, 22 Mad 364 See Note 52 under sec 5

It has been held in some cases of the Calcutta High Court that if a decree is signed several days after the judgment is pronounced, the period of limitation runs from the date of signing the decree—*Tarabati v Jagdeo*, 15 C W N 787, 10 I C 542, *Gangadhar v Shekharbasini*, 20 C.W N 967, 35 I.C 348, *Bani Madhab v Matungini*, 13 Cal 104 (F B) This view has also been followed by the Nagpur J. C Court which has recently laid down that no limitation begins to run against the appellant until the decree is drawn up and signed—*Tukaram v. Laxminarayan*, 89 I.C. 937, A I R. 1926 Nag 207 [Contra—*Dindayal v Anopi*, 22 N L.R 60, A I.R. 1926 Nag 349] But this view has not been accepted in several other cases, in which it has been said that what the appellant is concerned with is the date of the decree, which means, under O 20, rule 7 of the C. P.

Code, the date on which the judgment is pronounced; to him the date of signing of the decree is immaterial; such date is material only where the appellant has applied for a copy of the judgment and decree before the decree is signed. And so it has been held that time runs from the date of the judgment, and unless an application for a copy of the decree is made before it is signed, the period between the date on which the judgment is pronounced and the date on which the decree is signed cannot be deducted under sec. 12. See the cases cited in Note 127 under sec. 12.

The Nagpur Court has laid down in another case that under ordinary conditions where the decree is drawn up within the period of limitation prescribed for an appeal, the limitation for filing an appeal must be counted from the day on which the judgment is pronounced; but where owing to the default of the Court the decree was drawn up 17 months after the judgment was pronounced, the period of limitation would run from the date of the decree and not from the date on which judgment was delivered—*Pandu v. Rajeswar*, 20 N.L.R. 131, 78 I.C. 996, A.I.R. 1924 Nag. 271.

Under O. 20, rule 7, the decree shall bear the date on which the judgment is pronounced. Therefore if a judgment is written, signed and dated on the 17th January but is pronounced in open Court on the 10th February, the decree must bear the date of the 10th February, and limitation runs from that date. If the decree is dated 17th January, the date is wrong—*Sagarmal v. Lachmisaran*, 1 Pat. 771 (773), A.I.R. 1923 Pat. 129, 75 I.C. 879.

Where a Court gives judgment but refuses to give a decree till the successful party complies with a certain condition, the Court virtually postpones the decision of the suit. The effect of such an order is to pronounce a provisional judgment which does not become operative until the decree is prepared. The latter date is the date of the judgment as well as of the decree from which limitation runs. Where therefore a Court by its judgment directed that the decree was to be prepared only after a certain amount due as penalty was paid, and the decree was actually made three months after the judgment, on the day when the penalty was paid, held that the time commenced to run for the purpose of appeal from the date of the decree—*Khudadad v. Moriokhan*, 9 S.L.R. 193, 34 I.C. 867.

If an appeal is presented to a District Judge at his private house, after Court hours, on the last day of limitation, the Judge has jurisdiction to accept it (though he is not obliged to do so); if he accepts it, the appeal must be deemed to have been presented in time—*Thakur Din Ram v. Hari Das*, 34 All. 482 (486) F.B.

An appeal to the District Judge against the decree of a Revenue Court under the Agra Tenancy Act is governed by the procedure prescribed by C. P. Code (vide sec. 193 of the Agra Tenancy Act, 1901) and is therefore governed by the rule of limitation prescribed by this Article—*Ram Lal v. Amar Chand*, 10 A.L.J. 535, 17 I.C. 653.

153.—Under the same Thirty The date of the order.
 Code to a High days.
 Court from an order
 of a Subordinate
 Court refusing leave
 to appeal to His
 Majesty in Council.

647. This article refers to an appeal under O. 43, rule 1, clause (v) of the C. P. Code 1908, to the High Court from an order made by a subordinate Court refusing (under O. 45, rule 6) to grant a certificate that the case is a fit one for appeal to the Privy Council.

154.—Under the Code Thirty The date of the sentence
 of Criminal Proce- days. or order appealed
 dure 1898, to any from.
 Court other than a
 High Court.

648. An application made to a Superior Court under sec. 195 (6) of the Criminal Procedure Code to revoke a sanction granted by an inferior Court is not an *appeal* coming under Article 154 or 155, and such applications are not governed by the rule of limitation provided by the Limitation Act—*Bapu*, 39 Mad 750 (F.B.), *Pochai v. Emperor*, 40 Cal. 239; *Punna v. Jamita*, 1 Lah 602 [The sanction-clauses of sec. 195 Cr. P. Code have now been repealed]

When a Court records a finding under sec. 476 Cr. P. Code that an inquiry should be made, such finding comes under the word "order" in Art. 154, and an appeal against the order is governed by this Article. But limitation runs not from the date of recording the finding but from the time that a complaint is actually made as a result of that finding—*Daga Devji*, 52 Bom 164, 30 Bom L R 76, 29 Cr L.J. 315 (316), A.I.R. 1928 Bom 64. Time runs not from the date on which a civil Court signs the complaint but from the date when it is actually filed—*Labha Mal v. Wasawa*, 29 P.L.R. 128, 29 Cr L.J. 72. It may be that the appellant may not know that a complaint has been filed till after the expiry of 30 days prescribed by this Article, but in such a case the Appellate Court may excuse the delay under sec. 5 if sufficient cause is made out—*Daga Devji*, supra.

An appeal to the District Judge under sec. 476B Cr. P. Code, against an order of the Sub-Judge refusing to make a complaint under sec. 476, falls under this Article, and time runs from the date on which the Sub-Judge made the order refusing to take action under sec. 476—*Chandra Kumar v. Mathuriya*, 52 Cal 1009, 29 C.W.N. 1035, 26 Cr.L.J. 1569 (1570). In *Hamid Ali v. Madhusudan*, 54 Cal. 355, 31 C.W.N. 281, A.I.R. 1927 Cal. 284, there was a difference of opinion among the Judges as to whether the appeal was in the nature of a civil appeal or a

appeal, Chotzner J held that the appeal must be dealt with as an ordinary appeal under the Cr. P. Code, while Duval J. was of opinion that the appeal must be treated as a miscellaneous civil appeal regulated by O. XLI, C. P. Code; but no question of limitation was raised in this case.

155.—Under the same Sixty The date of the sentence
Code to a High days. or order appealed
Court except in the from.
cases provided for
by Article 150 and
Article 157.

649. An appeal preferred to the High Court under the Extradition Act is not governed by the period of limitation prescribed by this Article which is restricted only to appeals under the *Criminal Procedure Code*—*Hayes v. Christian*, 15 Mad. 414 (415). An appeal to the High Court, under sec 408 (b) Cr. P. Code, from a sentence exceeding 4 years passed by a Magistrate specially empowered is governed by the period of limitation prescribed by this Article—*In re Abdulla*, 2 Rang. 386. An appeal to the High Court against an order of a Civil Court (District Judge or Sub-Judge) making or refusing to make a complaint under sec. 195 or 476 of the Criminal Pro Code, is not a civil appeal governed by the Civil Pro Code, but a criminal appeal for which express provision is made under sec 476B of the Cr. P Code, and the appeal being one "under the Criminal Procedure Code" the period of limitation is 60 days under Art. 155, and not ninety days under Art. 156—*Rajani Kanta v. Bistoomoni*, 46 C.L.J. 40, 104 I.C. 456, A.I.R. 1927 Cal. 718 (719), 28 Cr.L.J. 840 (841), *Sheo Prasad v. Sheo Bans*, 24 A.L.J. 364, A.I.R. 1926 All. 211 (212), 93 I.C. 851. (See in this connection *Hamid Ali v. Madhusudan*, 54 Cal 355, cited under Art. 154). In both the above cases (46 C.L.J. 40 and 24 A.L.J. 368) the appellant was granted an extension of time under sec 5 as he had acted under a bonafide mistake of law in treating the appeal as a civil appeal governed by Art. 156. In a recent Calcutta case, where there was an appeal to the High Court Division Bench against a complaint made by a single Bench under sec. 476 Cr. P. Code, the High Court did not decide whether Art 151 or Art. 155 applied (i.e., whether it was a civil or criminal appeal), because in either case the appeal was within time—*Ramjan v. Moolji*, 56 Cal. 932, 33 C.W.N. 329 (332), 30 Cr L.J. 974.

In an appeal to the High Court against an order directing a complaint to be made, under sec 476B, Cr P. Code, time runs under this Article not from the date of the order directing that a complaint be drawn up but from the date of actually making the complaint—*Fitzholmes v. Crown*, 7 Lah. 77, 27 Cr.L.J. 1321 (1322), A.I.R. 1927 Lah 54.

Article 155 is not limited to appeals to the High Court from the Sessions Courts in the mofussil or from other Courts from which appeals to the High Court lie direct, but extends also to appeals to a Division

Bench of the High Court from the order of a Judge presiding at the original Criminal Session of the High Court, under sec. 449 clause (c) of the Cr. P. Code—*Thomas v. Emp.*, 53 Cal. 746, 27 Cr.L.J. 1304 (1305) A.I.R. 1926 Cal. 1203; *Gallagher v. Emp.*, 54 Cal. 52, 101 I.C. 657, 28 Cr.L.J. 481. If the appeal is barred by this Article, an application for leave to appeal under sec. 449 clause (c) of the Cr. P. Code is also barred, and an application for determination of the accused's status as to his being an European British subject under sec. 449 clause (c) read with sec. 443, Cr. P. Code, must be necessarily out of time—*Thomas v. Emp.*, supra.

156.—Under the Code Ninety The date of the decree
of Civil Procedure, days. or order appealed
1908, to a High from.
Court except in the
cases provided for
by Article 151 and
Article 153.

650. Appeal under the C. P. Code.—Article 156 when it speaks of the Civil Procedure Code, is on the face of it speaking of a Code which relates to *procedure* and does not ordinarily deal with *substantive* rights, and the natural meaning of an 'appeal under the C. P. Code' appears to be 'an appeal governed by the Code of the Civil Procedure so far as procedure is concerned.' Thus, an appeal to the High Court from the Court of the Recorder of Rangoon under the Burma Courts Act is, by virtue of sec. 97 of that Act, governed by the Civil Pro. Code as regards procedure, and the period of limitation for such appeal is consequently governed by this Article—*Aga Mahomed v. Cohen*, 13 Cal. 221 (223, 224). There seems to be no good reason for holding that an 'appeal under the C. P. Code' means only 'an appeal the right to prefer which is conferred by the Code itself.' On the other hand, an appeal the procedure with respect to which from its inception to its disposal is governed by the C. P. Code may rightly be spoken of as an appeal under the Code. Therefore, an appeal under the Land Acquisition Act, of which sec. 54 lays down that appeals from awards under that Act are governed as to their procedure from the date of the filing of the appeal to its disposal by the rules provided for in the Civil Procedure Code, is governed by this Article, although in the Land Acquisition Act there is no allusion to this Article—*Ramasami v. Deputy Collector of Madura*, 43 Mad. 51 (55), 53 I.C. 405. Moreover it has been held in *Manavikraman v. Collector of Nilgiris*, 41 Mad. 943, 49 I.C. 27, 35 M.L.J. 110, that an appeal under sec. 54 of the Land Acquisition Act is to be treated as an appeal under sec. 98 of the Civil Procedure Code. It has also been pointed out in *Dropadi v. Hira Lal*, 34 All. 496 (504), that there are several Acts, for example, the Succession Act, the Probate and Administration Act, and the Land Acquisition Act which make the C. P. Code applicable to the proceedings under those Acts, and give a right of appeal to the High Court but do not prescribe any period of

limitation for the appeal it has always been assumed that such appeals are appeals under the Code of Civil Procedure, and are governed by Article 156 of the Limitation Act—*Ramasami v. Deputy Collector of Madura*, 43 Mad. 51 (56), 53 I.C. 504.

A second appeal under section 27 of the Burma Courts Act is not subject to the limitation of time prescribed by this Article because that section gives a discretion to the Judicial Commissioner (High Court) under certain circumstances to admit a second appeal, and the period within which he may receive the appeal is also left to his discretion; to apply Art 156 to such a case would be to curtail the discretion which is unfettered in this respect—*Mahamad Hosein v. Inodeen*, 10 Cal. 946 (950).

Letters Patent Appeals are not appeals under the C. P. Code; they are governed by the special Rules of the several High Courts, and not by this Article. See *Naubat Ram v. Harnam Das*, 9 All. 115 (F.B.); *In re Hurruck Singh*, 11 W.R. 107; *Hurruck Singh v. Toolsee Ram*, 12 W.R. 458 (F.B.).

Date of decree —See notes under Article 152.

157.—Under the Code Six The date of the order of Criminal Proce- months. appealed from.
dure, 1898, from an order of acquittal.

651. This Article refers to an appeal by the Government under sec. 417 of the Criminal Procedure Code The sixty days' rule prescribed by Article 155 does not apply to appeals against acquittal—*Empress v. Jaydulla*, 2 Cal. 436 (438).

Although an appeal under sec. 417 Cr. P. Code would be in time if brought within six months, still justice, public interest, necessity and policy all require that such appeals should be preferred with all reasonable expedition possible, for there may be cases where a new trial may have to be ordered or further evidence to be taken, and the larger the interval that has elapsed since the investigation and trial, the greater is the inconvenience and difficulty, not only to get witnesses together but to obtain from them accurate or reliable testimony—*Empress v. Yakub Khan*, 5 All. 253 (255).

Although a period of six months is allowed under this Article, the High Court may allow an appeal even after the period, for sufficient cause shown under sec. 5 See *Government Pleader, Appellant*, 1 Weir 791; *Anonymous*, 2 Weir 462.

THIRD DIVISION : APPLICATIONS.

158.—Under the Code of Civil Procedure, 1908, to set aside an award. Ten days. When the award is filed in Court and notice of the filing has been given to the parties.

652. Change :—Before 1919, the 3rd column stood thus :—“When the award is submitted to the Court.” But by the Repealing and Amending Act of 1919, the 3rd column has been amended as it stands now.

[The following decisions, which were given before the above amendment, are no longer good law :—

Nobin Kolly Dabee v. Ambica Charan Banerjee, 5 C.W.N. 813 :—In this case it was held that time ran from the date on which the award arrived at the Registrar's Office for the purpose of being filed, and not from the date when it was actually filed.

Kalian v. Roshanbai, 8 S.L.R. 190, 27 I.C. 371; *Mansoor v. Mahomedin*, 5 S.L.R. 125, 13 I.C. 234—In these cases it was held that the period of limitation must be computed from the date of submission of the award in Court and not from the date of service upon the objecting party of the notice of filing the award in Court

Jawahir v. Mehr, 1916 P.W.R. 14, 34 I.C. 250—In this case it was held that time ran from the date fixed for the filing of the award and not from the date on which it was filed without the knowledge of the parties before the date fixed for its filing]

653. Scope :—This Article applies only to applications to set aside an award, i.e., to applications referred to in sec. 522, C. P. Code, 1882 (now para 16 of Second Schedule) to set aside an award on any of the grounds mentioned in sec. 521 (now para 15 of the second Schedule)—*Muhammad Abid v. Muhammad Asghur*, 8 All. 64 (67). This Article does not apply to proceedings under para 12 or 14 of the 2nd Schedule of C. P. Code, i.e., to an application to remit an award for reconsideration of the arbitrators owing to some illegality of the award apparent on the face of it—*Appaya v. Venkatasami*, 1918 M.W.N. 477, 47 I.C. 597; or to an application to modify or correct an award—*Hyder Saheb v. Giria Chettiar*, 24 M.L.J. 483.

Article 158 does not apply to an award which is *prima facie* an illegal award, e.g., an award signed by only one of two arbitrators and by an umpire who has not been legally appointed. Such an award is a nullity and need not be set aside within the period of limitation prescribed by this Article. But where the award is *prima facie* a legal award, and can only be shown to be illegal after an enquiry into the allegations of the

objector has been made, an application to set aside such award falls under this Article—*Ram Narain v. Baij Nath*, 29 Cal. 36 (41), explaining & All. 64.

654. Applications under this Article :—An application to set aside an award on the ground that three out of five arbitrators were not present at the time of the award and did not sign it, although it contained their names, is an application to set aside an award on the ground of misconduct of the arbitrators—which is a ground mentioned in sec. 521 C. P. Code: the application falls under this Article and must be made within the period prescribed by this Article—*Ram Narain v. Baijnath*, 29 Cal. 36 (38).

When a decree having been passed on an award, an application is preferred by the unsuccessful party to the High Court for revision, and it is found that the real object of the revision petition is to set aside the award, the revision petition is virtually an application to set aside an award, and is governed by the limitation of this Article—*Ghulam Khan v. Muhammad Hassan*, 29 Cal. 167 (185) (P.C.).

655. Limitation :—The object of the Legislature in allowing so short a period as ten days for the preferring of objections to awards would seem to meet those cases where litigants who are at first very willing to have their cases referred to the decision of arbitrators whom they regard as amicably disposed towards them, subsequently do their utmost to resile from their agreement and to set aside the award the moment the arbitrators decide against them. The legislature has framed article 158 with the object of discouraging and preventing such discreditable attempts—*Ram Narain v. Baij Nath*, 29 Cal. 36 (54).

When the arbitrators state a special case for the opinion of the Court, the award is not completed until the Court expresses its opinion upon the case submitted to it. Until this is done, there is no complete award, and the parties are not called upon to file their objections, if any, to the award—*Lakshman v. Ramchandra*, 48 Bom. 663, A.I.R. 1925 Bom. 22, 84 I.C. 378, 26 Bom. L.R. 836.

Para 10 of Sch. II, C. P. Code lays down that notice of the filing of an award shall be given to the parties. Art. 158 must be read with this para; and the period of ten days must be computed from the day on which the parties receive notice that the award has been submitted and not from the day on which it is actually filed in Court—*Sheo Bux v. Masuma Sriram*, 19 A.L.J. 404, A.I.R. 1921 All. 63, 63 I.C. 399; *Sita Ram v. Rupram*, 13 N.L.R. 172, 42 I.C. 66; *Sahib Ram v. Chait Ram*, 96 P.L.R. 1915, 28 I.C. 427. It should be noted that the last two decisions were given before the amendment of 1910, but they are in consonance with the amendment.

Section 3 of the Limitation Act does not apply to an application to set aside an award; the Court has no authority to extend the time prescribed by this Article on any sufficient ground whatsoever—*Surya v. Banwarl*, 18 C.W.N. 626 (628), 17 I.C. 7; *Devi Ditta v. Babu Ram*, 8

Lah. 274, 100 I.C. 955, A.I.R. 1927 Lah. 273. But see *Chaturbhuj v. Raghubar Dayal*, 36 All. 354 (361), where the High Court after setting aside in revision all orders in the case directed the lower Court to take cognizance of an application to set aside the award passed 3 years ago.

But the time may be extended under sec. 4—*Jawahir v. Mehr*, 1916 P.W.R. 14, 34 I.C. 250 (251).

The time required for obtaining a copy of the award shall be excluded by sec. 12 (4) although it is not necessary to file a copy of the award with the application to set aside the award—*Sova Chand v. Hurry Bux*, 46 Cal. 721 (727), 23 C.W.N. 280; *Ghulam Khan v. Md. Hassain*, 29 Cal. 167 (183) P.C.; *Wajid Ali v. Nawal Kishore*, 17 All. 211 (215).

The fact that the defendant had not applied to set aside the award within ten days prescribed by Art. 158 would not preclude him from appealing from the decree of the Court based upon the award, if he does not contest the award on any of the grounds mentioned in sec. 521 C. P. Code 1882 (para 15, Sch. 2, C. P. Code 1908)—*Muhammad Abid v. Muhammad Asghur*, 8 All. 64 (66).

A Court should pass a decree in terms of the award *after* the expiry of the period of 10 days prescribed by this Article for an application to set aside the award. If the decree is passed *before* that period, it is illegal and liable to be set aside—*Lakshman v. Ramachandra*, 48 Bom. 663, 84 I.C. 378, A.I.R. 1925 Bom 22; *Velu Pillay v. Appaswami*, 21 M.L.J. 44, 9 I.C. 197; *Raddaraju v. Narayanraju*, 1912 M.W.N. 1232, 17 I.C. 431; *Najmuddin v. Albert Peuch*, 29 All 584 (586); *Ravjibhai v. Dahyabhai*, 45 Bom. 832 (834); *Ranga Chetty v. Govindasami*, 1921 M.W. N. 793, A.I.R. 1922 Mad 179, 15 L.W. 160, 71 I.C. 266, *Hardeo v. Thana*, 48 P.R. 1882; *Muni Ram v. Ram Asray*, 24 O.C. 234, A.I.R. 1921 Oudh 148, 64 I.C. 690; *Sri Krishan v. Relumal*, 9 S.L.R. 183, 34 I.C. 845 (848); *Joymungul v. Mohan Ram*, 23 W.R. 429 (P.C.).

159.—For leave to appear and defend a suit under the summary procedure referred to in section 128 (2) (f) or under Order XXXVII of the same Code. Ten days. When the summons is served.

Change :—The words "or under Order XXXVII" have been added by the Indian Limitation Amendment Act XXX of 1925. For reasons of the amendment, see notes under Article 5 *ante* in which a similar amendment has been made.

656. When the summons is served :—The only date to which reference can be made as regards limitation, is the date of the service of summons as shown in the sheriff's return. The defendant

cannot escape the law of limitation by alleging that there was no service of summons at all. The question as to whether the summons was served or not may be taken into consideration on an application to set aside the decree if made (O. 37, r. 4)—*Madhub v. Woopendra*, 23 Cal. 573 (575).

After the time fixed by the summons for obtaining leave to appear and defend has expired, the Court has no power to extend the time—*Quazi Mahmud v. Sarat*, 5 C.W.N. 259 (262).

160.—For an order Fifteen When the application under the same days. for review is rejected. Code to restore to the file an application for review rejected in consequence of the failure of the applicant to appear when the application was called on for hearing.

161.—For a review of Fifteen The date of the decree judgment by a Pro days. or order. vincial Court of Small Causes or by a Court invested with the jurisdiction of a Provincial Court of Small Causes when exercising that jurisdiction.

657. This Article corresponds to Art. 160A of the old Limitation Act XV of 1877, and was introduced into that Act by sec. 36 of the Provincial Small Cause Courts Act, IX of 1887. Before the introduction of this Article, an application for review of a judgment of a Small Cause Court was held to be governed by the 90 days' rule under Article 173; see *Madon Mohan v. Purno Chundra*, 10 Cal. 297 (298).

An application for review of judgment of a Small Cause Court is required to be accompanied with the deposit of costs, according to the provisions of sec. 17 of the Pro. S. C. C. Act. If the application for review of judgment is made within the period of limitation, but the deposit is not made along with the application, the Court will not allow the deposit to be made after the period of limitation, unless sufficient cause is shown for

the delay (sec. 5). If no such cause is shown, the application for review of judgment will be dismissed as time-barred—*Abdul Sheikh v. Md. Ayab*, 24 C.W.N. 380, 56 I.C. 551, 31 C.L.J. 197.

162.—For a review of Twenty The date of the decree judgment by any days. or order.
of the following Courts, namely the High Courts of Judicature at Fort William, Madras, Bombay, Lahore and Rangoon, and the Chief Court of Sind in the exercise of its original jurisdiction.

658. The judgment of a High Court in the exercise of its matrimonial jurisdiction is a judgment of the High Court in its original jurisdiction—*Harriette King v. James King*, 6 Bom 416 (434). The judgment of a High Court passed in its Insolvency jurisdiction may be a judgment of the High Court in its original jurisdiction for the purpose of enforcing the judgment under Art 183 (*In re Candas Narrondas*, 13 Bom. 530, 533 P C), but not for the purposes of Art 162. The review of judgment referred to in this Article is a review contemplated by O 47, r 1, C P. Code, an application to the High Court for review of judgment passed by it in its Insolvency jurisdiction, under the provisions of sec. 8 (1), Presidency Towns Insolvency Act (III of 1909), is not governed by Article 162; nor is it governed by Art 173, because that Article is also restricted to applications for review under the C. P. Code. The proper Article is Art. 181—*In re L. W. Nasse*, 7 Rang. 201, A I R 1929 Rang. 229 (232), 118 I C 615. This Article does not apply to a review of a criminal case under cl 26 of the *Letters Patent*—*Padam Prasad v. K E*, 33 C W N 1121 (1137), (S B), 30 Cr L J. 993, 50 C L J. 106.

163.—By a plaintiff, for Thirty The date of the dismissal. an order to set aside days. a dismissal for default of appearance or for failure to pay costs of service of process or to furnish security for costs.

Under Act XV of 1877, the words in column I ran thus: "By a plaintiff, for an order to set aside a dismissal for default."

659. Default :—When the plaintiff is absent, and although a pleader for the plaintiff appears, he is instructed only to apply for an adjournment, and is unable to answer all material questions relating to the suit, his appearance is no appearance; and the dismissal of the suit, after rejection of the application for adjournment, is a dismissal for default of appearance—*Lalia Prasad v. Nand Kishore*, 22 All. 66 (76) (F.B.); *Shankar v. Radha Krishna*, 20 All. 195; *Hinga v. Munna*, 31 Cal. 150 (154), *Soonderlal v. Goorprasad*, 23 Bom. 414 (422). Cf. *Satish Chandra v. Ahara Prasad*, 34 Cal. 403 (F.B.).

A plaintiff whose suit has been dismissed for default under the Presidency Small Cause Courts Act, may either apply for a new trial within 8 days under section 38 of that Act, or may apply to have the order of dismissal set aside within thirty days under this Article—*Soonderlal v. Goor Prasad*, 23 Bom. 414 (426).

Non-appearance by reason of death is not default of appearance—*Debi Baksh v. Habib Shah*, 16 O C 194 (P.C.), 17 C.; W.N. 829, 19 I C 526. In such a case, the Court is not competent to dismiss the suit for default of appearance; and the plaintiff's representatives have six months (now 3 months) under Article 176 to be brought on the record—Ibid (overruling 14 I C 221 and 14 I C. 711).

660. Limitation :—An application under this Article must be made within thirty days from the date of dismissal. A mere notice of motion (given within 30 days) that the application would be made on a future date (which is beyond 30 days) will not prevent time from running—*Hinga v. Munna*, 31 Cal. 150 (154); *Khetter Mohun v. Kashinath*, 20 Cal. 899. If a vacation intervenes, the application must be made on the date the Court re-opens, and not on the first motion day after the vacation—*Hinga v. Munna*, 31 Cal. 150 (154). But according to the Rules of the Madras High Court, an application to the Registrar of the original side to issue a notice of motion is an application within the meaning of this Article and will save limitation notwithstanding that the notice mentions a date, beyond the thirty days, as the date on which the application will be heard—*Kuttayan v. Elleppa*, 17 M.L.J. 215.

Where a suit was dismissed for default on 19th December and an application to set aside the dismissal was made on the next day, but the application was rejected on the 23rd January because the applicant failed to produce a copy of the judgment and decree as directed by the Court, a second application for the same purpose made on the 16th February, i.e., nearly two months after the dismissal of the suit, was held to be barred—*Subba Row v. Venkataratnam*, 22 I.C. 689 (Mad.). But in an Allahabad case, where an application for re-admission of a suit dismissed for default was made within 30 days but it was rejected because it was made by a person who held an invalid power-of-attorney from the plaintiff, a fresh application for the readmission of the suit presented by that person under a proper power-of-attorney was granted, though presented more than 30 days after the dismissal for default but within 30 days from the date of the first application—*Ajodhya v. Chhabila*, 29 I.C. 1004 (All.).

The time during which the applicant had been erroneously prosecuting a suit to set aside the dismissal will be deducted under sec. 14 (2). The ruling in *Sheoji Ram v. Sheo Chand Rai*, 63 P.R. 1886 (decided under Act XV of 1877) is no longer good law, because under sec. 14 (2) of the present Act, the applicant is entitled to deduct the time spent in any civil proceeding (including a suit) and not merely the time spent in prosecuting an application.

The period of time prescribed in this Article can be enlarged by sec. 4, i.e., if the last day of limitation is a holiday, an application presented on the reopening day will be within time. But the day of closing of the wrong Court in which the application was erroneously filed will not be deducted—*Bano Mal v. Bano Mal*, 55 I.C. 55 (Lah.).

If an applicant fails to apply within the period prescribed by this Article he cannot evade the law of limitation by calling his application, which is in reality an application for setting aside a dismissal for default, an application for review of judgment—*Nur Mahammad v. Dina*, 15 P.R. 1897. But see *Fateh Chand v. Menghu Bai*, 109 P.R. 1913, 19 I.C. 481, where the Court held that it had power to entertain the application for review under the above circumstances. Cf. also *Raj Narain v. Ananga Mohan*, 26 Cal. 598.

The period prescribed by this Article cannot be extended under section 5—*Mahadeo v. Lakshminarayan*, 49 Bom 839, 90 I.C. 610, A.I.R. 1925 Bom. 521; *Ma Naw v. Somasundaram*, 2 Rang. 655, A.I.R. 1925 Rang 187, 85 I.C. 324, *Sahib Ditta v. Roda*, 83 P.R. 1902; *Saba v. Dayaram*, 23 N.L.R. 83, A.I.R. 1928 Rang 91 (92). Nor can it be extended by adding thereto the time for obtaining a copy of the order of dismissal—*Mohan Lal v. Sher Mahammad*, 93 I.C. 1023 (Lah.).

<p>164.—By a defendant, Thirty for an order to set days. aside a decree pass- ed <i>ex parte</i>.</p>	<p>The date of the decree, or where the sum- mons was not duly served, when the ap- plicant has know- ledge of the decree.</p>
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Change :—In column I, the word 'judgment' in the old Act has been changed into 'decree'; and the words in column 3 stood thus: "The date of executing any process for enforcing the judgment"

661. Old Act and new.—Where an application to set aside an *ex parte* decree was barred by the provisions of Art. 164 of the Act of 1877, long before the Act of 1908 was passed, the provisions of the new Act cannot revive the right to apply for setting aside the decree—*Nepal Chandra v. Niroda Sundari*, 39 Cal. 507 (509).

If the *ex parte* decree was passed while the old Act was in force, and the application was made after the Act of 1908 came into operation, the latter Act would apply, because the law to be applied to an ..

659. Default:—When the plaintiff is absent, and although a pleader for the plaintiff appears, he is instructed only to apply for an adjournment, and is unable to answer all material questions relating to the suit, his appearance is no appearance; and the dismissal of the suit, after rejection of the application for adjournment, is a dismissal for default of appearance—*Lalla Prasad v. Nand Kishore*, 22 All. 66 (76) (F.B.); *Shankar v. Radha Krishna*, 20 All. 195; *Hinga v. Munna*, 31 Cal. 150 (154); *Soonderlal v. Goorprasad*, 23 Bom. 414 (422). Cf. *Satish Chandra v. Ahara Prasad*, 34 Cal. 403 (F.B.).

A plaintiff whose suit has been dismissed for default under the Presidency Small Cause Courts Act, may either apply for a new trial within 8 days under section 38 of that Act, or may apply to have the order of dismissal set aside within thirty days under this Article—*Soonderlal v. Goor Prasad*, 23 Bom. 414 (426).

Non-appearance by reason of death is not default of appearance—*Debi Baksh v. Habib Shah*, 16 O.C. 194 (P.C.), 17 C.; W.N. 829, 19 I.C. 526. In such a case, the Court is not competent to dismiss the suit for default of appearance; and the plaintiff's representatives have six months (now 3 months) under Article 176 to be brought on the record—*Ibid* (overruling 14 I.C. 221 and 14 I.C. 711).

660. Limitation:—An application under this Article must be made within thirty days from the date of dismissal. A mere notice of motion (given within 30 days) that the application would be made on a future date (which is beyond 30 days) will not prevent time from running—*Hinga v. Munna*, 31 Cal. 150 (154); *Khetter Mohun v. Kashinath*, 20 Cal. 899. If a vacation intervenes, the application must be made on the date the Court re-opens, and not on the first motion day after the vacation—*Hinga v. Munna*, 31 Cal. 150 (154). But according to the Rules of the Madras High Court, an application to the Registrar of the original side to issue a notice of motion is an application within the meaning of this Article and will save limitation notwithstanding that the notice mentions a date, beyond the thirty days, as the date on which the application will be heard—*Kuttayan v. Elleppa*, 17 M.L.J. 215.

Where a suit was dismissed for default on 19th December and an application to set aside the dismissal was made on the next day, but the application was rejected on the 23rd January because the applicant failed to produce a copy of the judgment and decree as directed by the Court, a second application for the same purpose made on the 16th February, i.e., nearly two months after the dismissal of the suit, was held to be barred—*Subba Row v. Venkataratnam*, 22 I.C. 689 (Mad.). But in an Allahabad case, where an application for re-admission of a suit dismissed for default was made within 30 days but it was rejected because it was made by a person who held an invalid power-of-attorney from the plaintiff, a fresh application for the re-admission of the suit presented by that person under a proper power-of-attorney was granted, though presented more than 30 days after the dismissal for default but within 30 days from the date of the first application—*Ajodhya v. Chhabila*, 29 I.C. 1004 (All.).

The time during which the applicant had been erroneously prosecuting a suit to set aside the dismissal will be deducted under sec. 14 (2). The ruling in *Sheoji Ram v. Sheo Chand Rai*, 63 P.R. 1886 (decided under Act XV of 1877) is no longer good law, because under sec. 14 (2) of the present Act, the applicant is entitled to deduct the time spent in any civil proceeding (including a suit) and not merely the time spent in prosecuting an application.

The period of time prescribed in this Article can be enlarged by sec. 4, i.e., if the last day of limitation is a holiday, an application presented on the reopening day will be within time. But the day of closing of the wrong Court in which the application was erroneously filed will not be deducted—*Bano Mal v. Bano Mal*, 55 I.C. 55 (Lah.).

If an applicant fails to apply within the period prescribed by this Article he cannot evade the law of limitation by calling his application, which is in reality an application for setting aside a dismissal for default, an application for review of judgment—*Nur Mahammad v. Dina*, 15 P.R. 1897. But see *Fateh Chand v. Menghu Bai*, 109 P.R. 1913, 19 I.C. 481, where the Court held that it had power to entertain the application for review under the above circumstances. Cf. also *Raj Narain v. Ananga Mohan*, 26 Cal 598.

The period prescribed by this Article cannot be extended under section 5—*Mahadeo v. Lakshminarayan*, 49 Bom. 839, 90 I.C. 610, A.I.R. 1925 Bom 521; *Ma Naw v. Somasundaram*, 2 Rang 655, A.I.R. 1925 Rang 187, 85 I.C. 324, *Sahib Ditta v. Roda*, 83 P.R. 1902; *Saba v. Dayaram*, 23 N.L.R. 83, A.I.R. 1928 Rang 91 (92). Nor can it be extended by adding thereto the time for obtaining a copy of the order of dismissal—*Mohan Lal v. Sher Mahammad*, 93 I.C. 1023 (Lah.).

<p>164.—By a defendant, Thirty for an order to set days. aside a decree pass- ed <i>ex parte</i>.</p>	<p>The date of the decree, or where the sum- mons was not duly served, when the ap- plicant has know- ledge of the decree.</p>
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Change :—In column 1, the word 'judgment' in the old Act has been changed into 'decree'; and the words in column 3 stood thus : "The date of executing any process for enforcing the judgment."

661. Old Act and new.—Where an application to set aside an *ex parte* decree was barred by the provisions of Art 164 of the Act of 1877, long before the Act of 1908 was passed, the provisions of the new Act cannot revive the right to apply for setting aside the decree—*Nepal Chandra v. Niroda Sundari*, 39 Cal 507 (509).

If the *ex parte* decree was passed while the old Act was in force, and the application was made after the Act of 1908 came into operation, the latter Act would apply, because the law to be applied to an application

is the law existing at the time when the application is made—*Jia Bibi v. Ilahi*, 37 All. 597 (600); *Monohar v. Sadiqa*, 37 I.C. 292 (294), 101 P.R. 1916; *Zaibunnissa v. Ghulam*, 70 P.L.R. 1911, 10 I.C. 823; *Chidambaram v. Karuppan*, 35 Mad. 678 (679); *Basiruddin v. Sonaula*, 15 C.W.N. 102 (105), 6 I.C. 154.

A decree was passed *ex parte* against a minor in 1894; he became a major on the 11th January 1909 and applied on the 25th January to set aside the decree. The application would be governed by Art. 164 of the Act of 1908 and would be barred. The plea of minority was available under the Limitation Act of 1877, section 7 (which applied to all applications), but it would not now be available under section 6 of the present Act which applies only to applications for execution—*Chidambaram v. Karuppan*, 35 Mad. 678 (679), 8 I.C. 543; *Manohar v. Sadiqa*, 101 P.R. 1916, 37 I.C. 292.

662. Scope :—This Article applies to any application (made under O. 9, r. 13, C. P. Code) which involves the setting aside of the original decree, whether made to the original Court or to the Court of appeal after an appeal has been filed by the other defendants. In the latter case, *i.e.*, where the application to set aside the original decree passed *ex parte* is made to the appellate Court, the application falls under this Article and not under Article 169. This latter Article applies only to applications for rehearing of an appeal heard *ex parte*—*Sankara Bhatta v. Subraya*, 30 Mad. 535 (536). An application to set aside an *ex parte* decree passed by a Presidency Court of Small Causes falls within the terms of sec. 108 of the C. P. Code, 1882, (O. IX, r. 13) and the period of limitation for such an application is 30 days as prescribed by this Article and not 8 days as prescribed by sec. 38 of the Presidency Small Cause Court's Act—*Roshanlal v. Lachmi Narayan*, 17 Bom. 507 (509).

This Article applies not only to an application for setting aside *ex parte* decrees, but also to an application for setting aside *ex parte* orders in execution proceedings which come under section 47 C. P. Code, because such orders are treated as decrees—*Subbia Naicker v. Ramnathan*, 37 Mad. 462 (475), 26 M.L.J. 189, 22 I.C. 899.

This Article is not restricted to applications to set aside a decree passed in a suit. Where a person was served with a notice to appear on a certain date and to show cause why the award passed against him should not stand filed, and on his failing to appear on that date, the award was ordered to be filed, an application by that person to set aside the order passed *ex parte* falls under this Article. This Article applies to applications for setting aside *ex parte* orders passed in proceedings other than suits—*Fleming Shaw & Co v. Mangalchand*, A.I.R. 1921 Sind 56, 75 I.C. 1035.

Where the plaintiff brings a suit to set aside an *ex parte* decree not merely on the ground that it was passed without service of summons but also on the ground that it was obtained by fraud, Article 164 cannot apply (as it refers only to an application); the suit falls under Article 95—*Moti Lal v. Russick Chandra*, 26 Cal. 326, at p. 333 (Footnote).

O. 9, r. 13, C. P. Code applies only to Mofussil Courts and not to the Original Side of the High Court; in the latter Court a different practice prevails in the matter of entering appearance, for here the question is not whether the defendant was present at the hearing, but whether he had entered appearance in the office. Consequently Art. 164 does not apply to an application to set aside an *ex parte* decree, and the High Court has a discretion to restore a suit although the application is presented beyond 30 days—*Haji Ramjan v. Hafiz Abdul*, 32 C.W.N. 411 (412), 116 I.C. 633, A.I.R. 1928 Cal. 864, following *S. N. Banerjee v. H. S. Suhrawardy*, 32 C.W.N. 10.

663. 'Defendant':—In a probate application, the mere citing of a person does not make him a defendant. Under section 83 of the Probate and Administration Act, the cause must be contentious and the person cited must appear to oppose the grant of probate, before he becomes a defendant. If such person does not appear and the probate is granted *ex parte*, it cannot be said that an order is passed *ex parte* against a 'defendant,' and this Article cannot apply to an application by such person for revocation of the probate—*Saroja v. Abhoy Charan*, 41 Cal. 819 (823), 24 I.C. 27.

664. Ex-parte decree.—A payment order made *ex parte* under sec. 150 of the Companies Act (1882) is not a *decree*, and this Article does not apply to an application for setting it aside—*Hindusthan Bank Ltd v. Mehraj Din*, 1 Lah. 187 (191), 55 I.C. 820. An order granting leave to execute a decree against a person on the ground that he is a partner, made under O. 21, r. 50, sub-rules (2) and (3), is not a *decree* for the purpose of this Article, but is only treated as a decree for the purpose of an appeal or enforcement. Consequently Art. 164 cannot apply to an application to set aside an *ex parte* order of that kind—*Kanji v. Vasanji*, 53 Bom. 839, 31 Bom. L.R. 995, A.I.R. 1929 Bom. 386 (388), 120 I.C. 833.

There is no distinction between a case decided *ex parte* by reason of the non-appearance of the defendant at the first hearing, and a case decided *ex parte* by reason of the absence of the defendant at an adjourned hearing. In both cases, the defendant may apply to set aside the *ex parte* decree—*Jonardan v. Ramdhone*, 23 Cal. 738 (F.B.) (overruling *Sital v. Heera*, 21 Cal. 269), *Muniappan v. Balayan*, 31 Mad. 505 (506); *Hildreth v. Sayaji*, 20 Bom. 380.

When on the day of hearing the defendant appears in person but only for the purpose of applying for adjournment, and the application is refused and a decree follows, such decree is not an *ex parte* decree, because the defendant cannot be said not to have appeared—*Soonderlal v. Goor Prasad*, 23 Bom. 414 (421); but if the defendant is absent and a pleader on his behalf applies for an adjournment and the pleader has no other instructions but to get an adjournment and is unable to answer all material questions relating to the suit, the defendant cannot be said to have put in appearance; and if the application is refused, the decree which follows is *ex parte* decree—*ibid* (at p. 422); *Cooke v. Equitable Coal Co.*, 1

8 C.W.N. 621 (624); *Ram Tahal v. Rameshar*, 8 All. 140; *Shankar v. Radha*, 20 All. 195; *Ramanuja v. Rangaswamy*, 18 M.L.J. 51.

665. Limitation:—A decree was passed *ex parte* while the defendant was in jail. Five years afterwards the defendant applied to set aside the decree. It was held that if the application was treated as one for setting aside an *ex parte* decree, then it was barred by limitation, but if it was treated as an application for review of judgment, the Court should decide the question whether the applicant had shown sufficient cause for not applying earlier—*Janki v. Parmeswar*, 13 A.L.J. 482, 29 I.C. 975.

The mere fact that a party has not applied to set aside the *ex parte* decree within 30 days is no bar to his applying for review of judgment—*Chokkalingan v. Lakshmanan*, 38 M.L.J. 224, 55 I.C. 444; *Lala Chet Narain v. Rampal*, 16 C.W.N. 643, 15 I.C. 554. *Contra*—*Deodip v. Gopal Singh*, 1 P.L.J. 547, 38 I.C. 53; *Santu v. Arjun*, 13 I.C. 318; *Lal Devi v. Amar Nath*, 57 I.C. 15 (Lah.), and *Shavaksha v. Hugh Hogarth*, 12 Bom.L.R. 886, 8 I.C. 616; in these cases it has been held that a party who has not applied to set aside the decree within 30 days cannot evade the law of limitation by calling his application an application for review of judgment.

If an application to set aside an *ex parte* decree, which was made in time, was consigned to the record room, that fact does not in any way necessitate a fresh application, and a subsequent application must be considered as merely in continuance of the suspended original application. Consequently no question of limitation arises—*Barkatullah v. Fuzl Maula*, 55 I.C. 824 (826) (Lahore).

The third column of Articles 164 and 169 should be compared with that of Articles 163 and 168. In the case of a plaintiff or appellant seeking to set aside an *ex parte* decision, limitation runs only from the date of the order, whereas if a defendant or respondent seeks such relief, he can, in cases where he has not had due notice, count limitation from the date of his knowledge of the order—*Bissa Mal v. Kesar Singh*, 1 Lah. 363 (364), 58 I.C. 739.

Where service of notice on the defendant is not established, the Court has to decide whether the application is within time from the date when the petitioner came to know of the *ex parte* decree—*Mohla v. Kahnun*, A.I.R. 1925 Lah. 577, 91 I.C. 798.

The words "where the summons was not duly served" in the 3rd column seem to refer to the summons given for the first hearing of the suit; so, where there has been due service of such summons, the mere fact that the defendant has not received notice of an adjourned hearing will not cause limitation to run from the date on which the defendant becomes aware of the decree having been passed—*Lal Devi v. Amar Nath*, 57 I.C. 15 (Lah.); *Surjit Singh v. Torrie*, 76 I.C. 14, A.I.R. 1924 Lah. 666.

In computing the period of limitation, the time taken in prosecuting an infructuous proceeding in a wrong Court can be deducted—*Basiruddin v. Sonulla*, 15 C.W.N. 102 (106), 6 I.C. 154.

The period of limitation prescribed by this Article cannot be extended by the Court in the exercise of its inherent powers under sec. 151 C. P. Code—*Ajodhya Mahdon v. Phul Koer*, 1 Pat. 277, A.I.R. 1922 Pat. 479, 65 I.C. 341.

In Madras, the period prescribed by this Article can be extended under sec. 5 for sufficient cause; see Note 41 under sec. 5.

The time cannot be extended under sec. 6 See 35 Mad 678 cited in Note 661 above.

"Duly served".—The word "duly" does not mean "personally"; so, if the defendant is absent, service on any male member is undoubtedly due service; so is service on an agent or servant under the circumstances indicated in O. 5, C. P. Code—*Venkatachalam v. Subbaya*, 54 M.L.J. 448, A.I.R. 1928 Mad 655 (657), 108 I.C. 889. A summons is said to have been 'duly served' if it was served in such a manner that the defendant had knowledge of the suit or that the Court may presume that he had such knowledge (O. V, r. 19), even though it was not served in sufficient time to enable him to appear and answer on the day fixed in the summons—*Kasarchand v. Lakhamasi*, 11 S.L.R. 71, 42 I.C. 611; *Kasarchand v. Lakhamasi*, 8 S.L.R. 153, 27 I.C. 351.

Where the plaintiff knew that the defendant did not ordinarily reside in his ancestral house, and yet insisted upon the service of summons at that place, *held* that the summons was not duly served—*Kumud Nath v. Jotindra Nath*, 38 Cal. 394 (400) Where the plaintiff took out substituted service upon allegations which were false, the notice could not be said to have been duly served—*Ram Kishen v. Mula*, 69 I.C. 467, A.I.R. 1924 Lah. 191. But where substituted service has been lawfully made (e.g. where substituted service was directed by the Court after satisfying itself that the defendant was keeping out of the way to evade service) the summons is said to have been duly served, and time under this Article runs from the date of the decree, even though the summons does not come to the knowledge of the defendant—*Dittu Ram v. Nawab*, 26 P.L.R. 704, A.I.R. 1925 Lah. 639, 92 I.C. 272, *Shariba v. Abdul*, 51 Mad 860, 55 M.L.J. 565, A.I.R. 1928 Mad 815 (816), 110 I.C. 490; *Narasimha v. Balakrishna*, 52 M.L.J. 512, A.I.R. 1927 Mad. 487 (488), 101 I.C. 651; *Doraisami v. Balasundaram*, 52 M.L.J. 477, A.I.R. 1927 Mad. 507, 102 I.C. 243. But in a later Madras case it has been said that substituted service may be good service under the C. P. Code, but it is not *due* service within the meaning of this Article, the very word "substituted" clearly and conclusively indicates that it is not *due* service, i.e., it is not the service that is due to the defendant or that is due according to the provisions of law for the purpose of service—*Venkatachalam v. Subbaya*, 54 M.L.J. 488, A.I.R. 1928 Mad. 655 (657), 108 I.C. 889 This ruling (Single Bench) has been disapproved of by the Division Bench in 51 Mad. 860 cited above

Where a summons was sent by registered post to the defendant, and he wired to the Court for an adjournment which was refused, and an *ex parte* decree was passed, *held* that the summons had been duly served,

and time ran from the date of the decree—*Ghansi Ram v. Misri Lal*, 27 Bom L.R. 690, A.I.R. 1925 Bom 444, 89 I.C. 223.

A summons is said to be duly served on a firm, if it is served on any one of the partners of the firm, and time runs from the date of the decree—*Adiveppa v. Paragji*, 26 Bom.L.R. 388, A.I.R. 1924 Bom. 366, 80 I.C. 773

666. Knowledge of the decree:—This expression means a knowledge of the fact that a decree of the kind is in existence, but it does not embrace a knowledge of the contents and general effect of the decree—*Abdool Hoosein v. Esmailji*, 12 Bom. L.R 462, 6 I.C. 901. But the words of the Article mean something more than a mere knowledge that a decree has been passed in some suit in some Court against the applicant. It means that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed against him in a particular Court in favour of a particular person for a particular sum. It was not intended by the Legislature to lay down that the period under this Article would begin to run from the time the judgment-debtor might have received some vague information that a decree had been passed against him—*Bapuraao v. Sadhu Bhivba*, 47 Bom 485 (487), 25 Bom L.R 74, 76 I.C. 265, A.I R 1923 Bom. 193; *Kumud Nath v. Jotindra*, 38 Cal. 394 (403); *Palaniappa v. Vedachala*, A.I R. 1927 Mad 381, 99 I.C 621. Further, it must appear that the petitioner himself had a knowledge of the decree in the suit. Where the petitioner's brothers had knowledge of the *ex parte* decree passed against the petitioner, it cannot be reasonably inferred that the petitioner himself had a similar knowledge of it, particularly when it is proved that he lived away from his brothers who never communicated the fact of the decree to him—*Kumud Nath v. Jotindra Nath*, 38 Cal. 394 (403), 15 C.W.N. 399, 9 I.C. 189.

In an application under this Article the burden of proving want of knowledge of the decree till within 30 days before the application is on the applicant—*Piroj Shah v. Qarib Shah*, 7 Lah. 161, A.I.R. 1926 Lah. 379, 95 I.C. 124, *Sughru Mal v. Sham Lal*, 146 P.W.R. 1918, 46 I.C. 777.

667. Application by legal representative of defendant:—Where a defendant against whom an *ex parte* decree has been passed dies, an application by his legal representative (whether he has been brought on the record or not) to have the decree set aside must be made within the time allowed by this Article; Art. 181 will not apply. The word 'defendant' in this Article is wide enough to include the legal representative of the original defendant. The period of limitation runs from the date of the decree, as the summons was duly served on the original defendant. The alternative date mentioned in the second part of column 3 (viz., the date of knowledge of the decree) applies only where the summons was not duly served on the original defendant—*Venkalasubbier v. Krishnamurthi*, 38 Mad 442 (443, 444).

[As stated before, the period of limitation under the Act of 1877 ran from the date of executing any process in enforcement of the judgment.

The rulings in *Hanmant v. Shankar*, 31 Bom. 303, *Bhoobanessury v. Judobendra*, 9 Cal. 869, *Pooroo v. Prosonna*, 2 Cal. 123, *Shah Muhammad v. Hanmant*, 20 All. 311, *Sunraj v. Ambika*, 6 All. 144, *Har Prasad v. Jafar Ali*, 7 All. 345, *Rajab Ali v. Upper India Paper Mills*, 15 O.C. 289, 17 I.C. 420, decided with reference to the starting point of limitation under the old Act, are no longer of any importance.]

165.—Under the Code Thirty The date of the dis-
of Civil Procedure days. possession.

1908, by a person
dispossessed of im-
moveable property
and disputing the
right of the decree-
holder or purchaser
at a sale in execu-
tion of a decree to
be put into posses-
sion.

668. This Article contemplates the case of a person *other than the judgment-debtor* who applies to be restored to possession under O. XXI, r. 100 of the C. P. Code. Where, therefore, a *judgment-debtor* applies to be restored to possession of property seized by the decree-holder in excess of what has been decreed, the application falls under section 47 of the Code, and is governed by Art. 181 of this Act—*Abdul Karim v. Islamunnissa*, 38 All. 339 (344), 14 A.L.J. 401; *Bahur Das v. Giris*, 67 I.C. 663, A.I.R. 1923 Cal. 287, *Vachali Rohini v. Kombi Aliassan*, 42 Mad. 753 (760) F.B. (overruling *Ratnam Ayyar v. Krishna Dass*, 21 Mad. 494); *Rasul v. Amina*, 46 Bom. 1031 (1036), A.I.R. 1922 Bom. 271, 24 Bom.L.R. 771, 68 I.C. 349; *Sharju v. Mir Khan*, 1 Lah.L.J. 230; *Maung Tha v. Ma Pyu*, 46 I.C. 323, 1918, 3 U.B.R. 79; *Jilai v. Abdul Rahman*, 4 Luck. 209, 115 I.C. 444, A.I.R. 1929 Oudh 76 (79) (dissenting from 6 O.C. 44 and 17 O.C. 94). The contrary view is taken in *Har Din v. Lachman*, 25 All. 343, *Rajaram v. Itraj Kunwar*, 17 O.C. 94, 24 I.C. 137, and *Jagannath v. Datta*, 6 O.C. 44, where an application by a *judgment debtor* has been held to fall under this Article. These three rulings are no longer correct, in view of the current of modern decisions cited above.

The judgment-debtor cannot even file a suit, and if he files a suit, it will be treated as an objection under sec. 47 C. P. Code—*Jilai v. Abdul Rahman*, *supra*.

166.—Under the same Thirty The date of the sale.
Code to set aside a days.
sale in execution of
a decree, including

any such application by a judgment debtor.

This Article corresponds to Arts. 166 and 172 of Act XV of 1877.

Change :—The italicised words have been added in the first column by the Indian Limitation Amendment Act 1927 (I of 1927), in pursuance of the following recommendations of the Civil Justice Committee: "There is a difference of opinion as to whether this Article (166) which deals with a petition to set aside a sale in execution of a decree applies when the petition is by a judgment-debtor under sec. 47 Civil Procedure Code. It is sometimes contended that that Article applies only to a petition under Order XXI, rule 90 alone. It will be better if the matter is made clear by adding words in the first column so as to include a petition under sec. 47 C. P. Code"—*Civil Justice Committee Report*, pp. 495-496.

669. Scope :—The scope of this Article is something wider than that of Arts. 166 and 172 of the Act of 1877 taken together; it applies to all applications under the C. P. Code for setting aside an execution sale.

Art. 166 of the old Limitation Act applied only when the application was made on the ground of irregularity in publishing or conducting the sale (O. 21, r. 90), or on the ground that the decree-holder purchased without the permission of the Court (O. 21, r. 72); and Art. 172 applied only where the ground of setting aside the sale was that the judgment-debtor had no saleable interest in the property.

But if the sale was sought to be set aside on any other ground, the application fell under Art. 178 (i.e. 181 of this Act). Thus, if the sale was sought to be set aside on the ground that it was brought about by fraud, Art. 178, and not Art. 166 applied—*Nemai v. Deno*, 2 C.W.N. 691; *Sakharam v. Damodhar*, 9 Bom. 468; *Sarat v. Nemai*, 5 C.W.N. 265; *Bhuban Mohun v. Nunda Lal*, 26 Cal. 324; *Purno Chandra v. Anukul*, 36 Cal. 654 (656); so was the case if the sale was sought to be cancelled on the ground that notice was not served on the judgment-debtor as required by section 248 C. P. Code (O. 21, r. 22)—*Livinia Ashton v. Madhabmoni*, 14 C.W.N. 560, 5 I.C. 390; *Lakshmi v. Srish*, 13 C.L.J. 162, 9 I.C. 584; or on the ground that the judgment-debtor had purchased the property in contravention of the provision of law—*Chand Monee v. Santa Monee*, 24 Cal. 707 (710).

But now the present Article is quite general in its terms and is not restricted to applications under O. 21, rules 72 and 89 to 91; it is comprehensive enough to cover all applications under the C. P. Code for setting aside execution sales on any ground whatsoever. An application under the C. P. Code to set aside a sale in execution of a decree falls under this Article, even though the application falls under sec. 47 C. P. Code and not under O. 21 rule 90—*Ramdhari v. Deonandan*, 2 Pat. 65, 3 P.L.T. 501, 77 I.C. 957, A.I.R. 1922 Pat. 507; *Ganapathi v. Krishnamachariar*, 43 M.L.J. 184, A.I.R. 1922 Mad. 417, 70 I.C. 743; *Ma Pwa v. Ma. Tambi*, 1 Rang. 533, 77 I.C. 368, A.I.R. 1924 Rang. 124; *Haripada*

v. *Barada Prosad*, 51 Cal. 1014, A.I.R. 1925 Cal. 351, 82 I.C. 322. This Article applies to an application to set aside a sale on the ground that the personal property of the applicant was sold in execution of a decree against the applicant's father—*Satis Chandra v. Nishi Chandra*, 46 Cal. 975 (977, 978), 54 I.C. 431; it applies to an application to set aside a sale on the ground that the sale took place contrary to the directions given in the decree—*Muthia Chettiar v. Bava Saheb*, 27 M.L.J. 605, 26 I.C. 46; it applies where the execution-sale is sought to be set aside on the ground of fraud—*Arjun v. Gunendra*, 18 C.W.N. 1266, 27 I.C. 294; *Rai Kishori v. Mukunda*, 15 C.W.N. 965, 11 I.C. 295; *Ganapathi v. Krishnamachari*, 43 M.L.J. 184, 70 I.C. 743, A.I.R. 1922 Mad. 417; *Ramdhari v. Deonandan*, 2 Pat. 65, A.I.R. 1922 Pat. 507, 77 I.C. 957, 3 P.L.T. 501; it applies to an application to set aside a sale on the ground of irregularity in the service of notice under O. 21, rule 22—*Das Narayan v. Mir Mahammad*, 6 P.L.J. 319 (326), A.I.R. 1921 Pat. 145, 61 I.C. 823; or on the ground that there was no attachment prior to the sale or that there had been a defective attachment—*Ma Pwa v. Md Tambi*, 1 Rang 533, A.I.R. 1924 Rang. 124, 77 I.C. 368.

An application made after the present Act of 1908 came into operation to set aside a sale held prior to that Act, on the ground of fraud, is governed by Art. 166 of the present Act and not by Art. 178 of the Act of 1877. Section 6 of the General Clauses Act does not preserve the right of the applicant to apply within three years of the date of sale, which he had under Art. 178 of the old Act—*Rai Kishori v. Mukunda*, 15 C.W.N. 965 (971), 11 I.C. 295; *Ganapathi v. Krishnamachari*, 43 M.L.J. 184, 70 I.C. 743, A.I.R. 1922 Mad. 417.

Under the C. P. Code 1882, if the auction-purchaser failed to obtain possession of the property purchased owing to the judgment-debtor having no saleable interest in the property, the purchaser was entitled under section 315 of that Code to receive back the purchase-money, and an application for the refund of the money was governed by Article 178 of the Limitation Act of 1877; the purchaser was not required to make any application for setting aside the sale as contemplated by Article 172 of the Act of 1877. But the law has undergone a change after the passing of the C. P. Code of 1908. Under this Code, a purchaser who fails to obtain possession of the property purchased, on account of the judgment-debtor having no saleable interest in the property, is required to make an application under O. 21, rule 91 to set aside the sale, and then when the sale is set aside, to make another application for refund of the purchase-money under O. 21, rule 93. The first application is governed by Article 166 of the present Limitation Act, and the second application by Article 181—*Makar Ali v. Sarfuddin*, 50 Cal. 115 (120-122), A.I.R. 1923 Cal. 85, 70 I.C. 606, 27 C.W.N. 183; *Balwant v. Balz*, 46 Bom. 833, A.I.R. 1922 Bom. 205, 67 I.C. 360.

Under O. 21, rule 89, C. P. Code, the judgment-debtor may obtain a reversal of the sale by deposit of money in Court; such deposit must be made within thirty days from the date of sale, as provided by this

Article—*Chaudhury Rameshwar v. Chaudhury Sureshwar*, 2 P.L.J. 164 (165), 39 I.C. 664; *Md. Cassim v. David*, 6 Rang., 490, A.I.R. 1928 Rang 286. But it should be remembered at the same time that the mere deposit of money required by O. 21, 89 of the C. P. Code cannot by itself be treated as an application to set aside the sale. There must be a separate application along with the deposit. If the deposit is made within 30 days but the application is made beyond the period, it is barred—*Ram Autar v. Sheo Peary*, 12 O.L.J. 137, 87 I.C. 722, A.I.R. 1925 Oudh 411; *Mathura v. Ram Lal*, 9 I.C. 33 (All.) See also *Parath Veetil v. Ambulath Veetil*, 32 I.C. 45 (Mad.), and *Sarovi Begum v. Haider Shah*, 9 A.L.J. 12, 13 I.C. 404.

This Article refers to applications under the C. P. Code. An application to set aside a sale conducted by the Insolvency Court in realising assets of the insolvent under section 20 and 23 of the Provincial Insolvency Act (III of 1907) is governed by Article 181 and not by this Article—*Mir Afzal Ali v. Mir Aman Ali*, 107 P.L.R. 1914, 23 I.C. 397. (But *quære* whether Article 181 will apply, since that Article is also restricted to applications under the C. P. Code). So also, an application to set aside a sale under sec. 47 of the Chota Nagpur Tenancy Act is not governed by this Article but by the special provision of sec. 231 of that Act—*Nilmoney v. Roban Majhi*, 1 P.L.J. 483 (484), 20 C.W.N. 1243, 37 I.C. 683. As regards an application under sec. 173 Bengal Tenancy Act to set aside a sale in execution of a rent decree on the ground that the judgment-debtor has purchased the property in the name of another person, the Calcutta High Court recently holds that the application is cognizable under sec. 47 C. P. Code and attracts the operation of Article 166 of the Limitation Act—*Haripada v. Barada Prasad*, 51 Cal. 1014, A.I.R. 1925 Cal. 351, 82 I.C. 322. But in an earlier case of the same High Court it was held that such application did not come under Article 166, and that as no other Article of the Limitation Act or of the 3rd Schedule of the Bengal Tenancy Act was applicable, the application fell under the residuary Article 181—*Chand Monec v. Santo Monec*, 24 Cal. 707 (709). An exactly the same view was taken by the Patna High Court in *Chandrama v. Maharaja of Dumraon*, 38 I.C. 209 (case under sec. 173, Bengal Tenancy Act). The Patna High Court also holds that an application under sec. 227 of the Orissa Tenancy Act (corresponding to sec. 173 B. T. Act) for setting aside a sale on the ground that the holding was purchased by the judgment-debtor himself through another person is not an application under the C. P. Code, and Art. 166 cannot apply; and as it does not fall under any of the classes of applications mentioned in Sch. III of the O. T. Act, the special rule of limitation laid down in that Act does not apply; consequently Article 181 of the Limitation Act will apply—*Ananta Charan v. Nimal*, 6 Pat. 366, 101 I.C. 564, A.I.R. 1927 Pat. 177 (dissenting from 51 Cal. 1014).

670. Void sales:—If the execution-sale is not binding on the judgment-debtor or is made without jurisdiction or is an absolute nullity, this Article does not apply—*Payidanna v. Lakshminarasamma*, 38 Mad. 1076; *Shivbal v. Yesu*, 43 Bom. 235, 48 I.C. 130; *Seshagiri v. Srinivasa*,

43 Mad. 313 (315), 56 I.C. 260; *Jogeswar v. Jhapa Santal*, 51 Cal. 224 (229); *Samandam v. Malikandi*, 26 M.L.J. 267, 23 I.C. 251; *Behari Lal v. Tanuk Lal*, 8 P.L.T. 28, A.I.R. 1926 Pat. 397, 97 I.C. 798. In such a case, the judgment-debtor need not make any application for setting aside the sale, but may bring a suit for recovery of possession, within 12 years from the date of delivery of possession. If, however, the judgment-debtor makes any application, the application would be governed by three years' rule under Art. 181—*Behari Lal v. Tanuk Lal*, (supra).

Thus, if the judgment-debtor was not a party to the suit and was not sufficiently represented by any one in the suit, the sale is not binding on him, and does not require to be set aside either by a suit under Article 12 or by an application under Article 166—*Payidanna v. Lakshminarasamma*, 38 Mad. 1076 (1081). If the property of the defendant is exonerated by the decree from liability, a sale of his property held in execution of the decree is void, and an application by the defendant to set aside the sale would be governed by Article 181, not by this Article—*Seshagiri v. Srinivasa*, 43 Mad. 313 (315), 56 I.C. 260, 38 M.L.J. 62.

The plaintiff obtained an *ex parte* decree for Rs. 86 against the defendant in 1906, and in execution thereof the defendant's house was sold and purchased by the plaintiff in 1910. Subsequently the defendant succeeded in getting the *ex parte* decree set aside, and in having the case retried, but the result was a decree passed in 1914 in plaintiff's favour for Rs. 87. The defendant paid up the amount of the second decree and applied to have the previous sale set aside. It was held that the previous sale held under the previous decree which was set aside should be treated as a nullity, as having been no longer based on any solid foundation, and that the application was governed by Art. 181, not by this Article, and was quite in time—*Shivbai v. Yesu*, 43 Bom. 235 (239), 48 I.C. 130.

But a sale held without notice of sale proclamation being given to the judgment-debtor is not a nullity, and an application to set it aside is governed by this Article—*Ncelu v. Subramania*, 11 L.W. 59, 1919 M.W.N. 897, 53 I.C. 809. An execution sale of property which turns out not to belong to the judgment-debtor is not void ab initio but voidable only. A decree-holder auction-purchaser whose decree has been recorded as satisfied cannot, upon a defect in the judgment-debtor's title appearing, reopen his decree and proceed to obtain further satisfaction of it, without first setting aside the sale under O. 21, r. 91, within the period of limitation prescribed by Article 166—*Jagannadha v. Basanayya*, 53 M.L.J. 255, 104 I.C. 614, A.I.R. 1927 Mad. 835, *Muthukumarasami v. Muthusami*, 50 Mad. 639, A.I.R. 1927 Mad. 394, 100 I.C. 522.

So also, where the proclamation of sale was not published in the village in which the property was situate, the omission was an illegality, but such illegality did not make the sale a nullity and an application by a judgment-debtor to set aside the sale is governed by Article 166 and not by Article 181—*Paramasiva v. Palakuruppa*, 47 Mad. 525, A.I.R. 1924 Mad. 137, 77 I.C. 631, 45 M.L.J. 829. The mere fact that there

was an illegality in the procedure does not make the sale null and void. Article 166 applies to every application to set aside a sale, whether the ground for seeking to set aside the sale is the commission of an irregularity or an illegality—*Ibid* (at p. 529). In this case Spencer J. warned against the common practice of stigmatising any and every illegal or irregular sale as a nullity, and remarked (at p. 530): "It is not uncommon to hear a sale described as a nullity if there is an illegality affecting the jurisdiction of the executing Court, and illegalities are commonly supposed to take applications to have sales set aside out of the scope of O. XXI, rule 90. Ever since the Privy Council in *Malkarjun v. Narhari* (25 Bom. 337) distinguished between a total absence of jurisdiction and an erroneous working out of a valid decree against an estate after its owner's liability is established, there should be no room for misconception. But unfortunately it is not uncommon to hear the expression 'nullity' indiscriminately applied to sales by Court, as if by that magic word the statute of Limitation was abolished."

Where the notice under O. XXI rule 22 has not been issued to the judgment-debtor in respect of an execution application filed more than a year after the decree, a sale held in execution is not merely voidable, but void as against the person to whom notice should have been, but was not, issued; such a sale does not require to be set aside; but if a party filed an application to set aside the sale either under sec. 47 C. P. Code or otherwise, the application is governed by Article 181, not by Article 166. The party may also file a suit to recover the property within 12 years (Art. 144)—*Rajagopala v. Ramanujachariar*, 47 Mad. 288 (304) (F.B.), 46 M.L.J. 104, 80 I.C. 92, A.I.R. 1924 Mad. 431 (disapproving *Viswanathan v. Somasundaram*, 45 Mad. 875 where such omission was held to be only a material irregularity not invalidating the sale); *Monmatha v. Luchmi*, 55 Cal. 96, A.I.R. 1928 Cal. 60, 105 I.C. 65; *Ram Kinkar v. Sthiti Ram*, 27 C.L.J. 528, 46 I.C. 221; *Behari Lal v. Tanuk Lal*, 8 P.L.T. 28, A.I.R. 1926 Pat. 397, 97 I.C. 798

A sale held in contravention of the terms of O. 34, rule 14 is not void but voidable, and an application to set aside the sale must be made under this Article within thirty days from the date of the sale. Even if the property is purchased by a third party and not by the mortgagee himself, the purchaser cannot bring a suit to set aside the sale but can only make an application (sec. 47 C. P. Code) to set aside the sale, and the application falls under Article 166—*Bhaichand v. Ranchhodas*, 45 Bom. 174 (186), 58 I.C. 231.

671. Limitation :—Under the plain language of this Article, the period of limitation runs from the date of sale, and not from the date of confirmation of the sale—*Sitaram v. Asaram*, 19 N.L.R. 162, A.I.R. 1924 Nag. 108, 78 I.C. 47; *Vana v. Ratilal*, 28 Bom. L.R. 510, 93 I.C. 549, A.I.R. 1926 Bom. 335; *Wasudco v. Hiralal*, 8 N.L.R. 177, 17 I.C. 894. The remark made by Oslfield J. in *Tirumalaisami v. Subramanian*, 40 Mad. 1009 (at p. 1015) that the period of limitation under Article 166 is thirty

days from the date of *confirmation* of the sale,, is not correct. It is a mere obiter not necessary for the decision of the case.

If a sale took place on a certain date, but the sale officer did not make a declaration on that date as to who was the purchaser, but gave the information on a subsequent date, it is the latter date which must be taken as the date of sale. The mere making of a bid does not conclude the sale. For the conclusion of a sale it is necessary for the sale officer to accept the final bid and to make a declaration as to who is the purchaser and to order him to pay over 25 per cent. of the purchase-money—*Munshi Lal v. Ram Narain*, 35 All. 65, 17 I.C. 783.

The period of 30 days prescribed by this Article cannot be extended by the provision of sec. 5—*Umrao Singh v. Beni Prasad*, 92 I.C. 839 (Lah.), A.I.R. 1926 J. 100; *Ram Autar v. Sheo Peary*, 12 O.L.J. 137, A.I.R. 1925 Oudh 411, 87 I.C. 722. But in computing the period of limitation, the time during which the applicant had been prosecuting a suit in good faith will be deducted under sec. 14—*Ganapathi v. Krishnamachari*, 43 M.L.J. 184, A.I.R. 1922 Mad. 417, 70 I.C. 743.

672. Fraud :—If fraud is proved, the applicant is entitled to the benefit of sec. 18; that is, the period of limitation runs from the date when the fraud first became known to the applicant—*Arjun v. Gunendra*, 18 C.W.N. 1266 (1271), 27 I.C. 294; *Ramdhari v. Deonandan*, 3 P.L.T. 501, 2 Pat. 65, A.I.R. 1922 Pat. 507, 77 I.C. 457. But in order to entitle the applicant to get the benefit of section 18, he must show not only that there was fraud, but that he was by reason of the fraud *kept from the knowledge of his right* to make the application. See the cases cited under sec. 18 at page 150 *ante*. Limitation runs from the date when the fraud first becomes known, and it is immaterial that the sale has been confirmed before that date in ignorance of the fraud—*Mohendra v. Gopal*, 17 Cal. 769 (dissenting from *Gobind v. Umacharan*, 14 Cal. 679), *Golam v. Jadhithir*, 30 Cal. 142 (153); *Sheo Ram v. Ikramunnissa*, 45 All. 316, 21 A.L.J. 176, A.I.R. 1923 All. 282, 71 I.C. 631. See Note 172 under sec. 18.

673. Application by a minor :—The present Limitation Act, as amended, does not provide for an application for execution of a decree, but under the old Limitation Act he was entitled to such privilege. And a right which accrued to a minor judgment-debtor under the Act of 1877 to apply after attaining majority to set aside a sale which took place before the Act of 1908 came into force, is not taken away by the coming into operation of the latter Act, that being a privilege which has been preserved by sec. 6 (c) of the General Clauses Act—*Fazl Karim v. Annada*, 15 C.W.N. 845 (847), 11 I.C. 401.

167.—Complaining of Thirty The date of the resistance or ob- days. stance or obstruction to delivery of possession of

immoveable property decreed or sold in execution of a decree.

674. Scope :—The application contemplated in this Article is an application under O. 21, r. 97, C. P. Code.

A minor applicant was entitled under the Act of 1877 to make an application under this Article within one month of his attaining majority—*Vinayakrao, v. Derarao*, 11 Bom. 473 (474). But the present Act gives no such privilege to a minor, as section 6 is restricted to applications for execution of decrees, and does not, like the corresponding section of the old Act, apply to all applications.

If an application made beyond the thirty days prescribed by this Article is admitted, no appeal lies against the order of admission; but in an appeal against the final order passed under sec. 321 C. P. Code 1882 (now O. 21, rule 99) the order of erroneous admission of the time-barred application can be objected to; and the Appellate Court is bound to entertain the objection and to dismiss the application if it is found to have been wrongly admitted by the Lower Court—*Lala v. Narayan*, 21 Bom. 392 (393).

It is not obligatory upon the purchaser or the decree-holder to proceed to make an application complaining of resistance. The option rests with him to pursue his remedy either summarily by an application under section 328 C. P. Code 1882 (now O. XXI, r. 97) or by a regular suit complaining of the obstruction and seeking possession. The two remedies are concurrent, and the fact that he has not made an application within 30 days under Article 167 is not a bar to his filing a regular suit—*Balwant v. Babaji*, 8 Bom. 602 (608). If the purchaser omits to make an application within thirty days as prescribed by this Article, he can bring a suit for possession, provided it is brought within twelve years from the date of his purchase—*Shoteenath v. Obhoy*, 5 Cal. 331 (333).

If the decreeholder-purchaser makes an application within 30 days after the resistance, the application may be registered as a regular suit under sec. 331 C. P. Code, and the rights of the parties will be determined as if an ordinary suit for possession has been instituted by the decreeholder against the defendant (under Article 138 or 144)—*Namdev v. Ramchandra*, 18 Bom. 37 (40). But if the decreeholder makes the application more than 30 days after the date of resistance, the application cannot be registered as a suit, but the decreeholder may file a separate regular suit—*Valliammal v. Shanmugam*, 7 M.L.T. 223, 6 I.C. 288.

In Madras, it has been laid down that even though the decreeholder or purchaser makes no application under Article 167 (complaining of resistance) within 30 days from the date of resistance, he is entitled to make an application for delivery of possession, the limitation period of which is three years (Art. 180)—*Muttia v. Appasami*, 13 Mad. 504 (507).

followed in *Abdul Karim v. Timmaraya*, 24 I.C. 512 (Mad). But the Allahabad and Bombay High Courts are of opinion that the failure to apply within 30 days of the date of resistance is a bar to an application for delivery of possession, because such application is virtually an attempt to renew the old proceedings which were allowed to fall through, and that the only remedy of the decreeholder is a regular suit for possession—*Kesri Narain v. Abdul Hasan*, 26 All. 365 (367); *Vinayakrav v. Devrao*, 11 Bom. 473 (474).

Fresh resistance :—Where at first there was an obstruction, but no application was made by the decreeholder within 30 days from the date of the obstruction, and then the decreeholder applied for and obtained a fresh warrant for possession, but was *again resisted*, held that the decreeholder was entitled to make an application under Article 167 within one month from the date of the *second* resistance, though more than one month after the first resistance. The fact that no application was made within 30 days of the first resistance did not bar the present application—*Rama-sekhara v. Dharmaraya*, 5 Mad. 113 (114). Where the decreeholder applied for possession of 19 shops decreed to him, but being resisted made an application complaining of the resistance, and the Court ordered that the decreeholder be put in possession of 15 out of 19 shops, and then the decreeholder having applied for possession of the remaining 4 shops, he was again resisted, and again made an application complaining of the resistance within 30 days from the date of the second resistance, held that the application was not barred—*Narain Das v. Hazari Lal*, 18 All. 233 (237), following 5 Mad. 113.

Where the original resistance was by a third person, and no application was made by the purchaser under Article 167 within 30 days of the resistance, and then the present obstruction is made by the judgment-debtor himself (who does not claim in any way through the third party who was the original obstructor), the purchaser may make an application for delivery of possession within 3 years of the second resistance—*Vinayakrao v. Devrao*, 11 Bom. 473 (475).

168.—For the re-admission of an appeal dismissed for want of prosecution. Thirty days. The date of the dismissal. missal.

675. Scope —This Article applies where the appeal is dismissed under the C. P. Code, and not where it is dismissed under the Rule of Court. Thus, where an appeal is dismissed under Rule 17 of the Rules of the High Court, Part II, Ch. VIII, for failure to deposit the estimated amount of costs for the preparation of the paper book, an application for re-admission of the appeal does not fall under this Article—*Ramhari v. Madan Mohan*, 23 Cal. 339 (347).

This Article has no application where the order of dismissal is *ultra vires*—*Ala Mahomed v. Shankar Das*, 69 I.C. 618, A.I.R. 1924 Lah. 279.

This Article refers to an application under O. 41 rule 19 of the C. P. Code, under which, if sufficient cause is shown for default, the Court is

bound to re-admit the appeal—*Sonubai v. Shivajirao*, 45 Bom 648 (652), A.I.R. 1921 Bom. 20, 23 Bom L.R. 110, 60 I.C. 919. But an application for the re-admission of an appeal dismissed for failure to give security for costs under O. 41, rule 10 of the C. P. Code does not fall under this Article—*Goljan Bibi v. Najar Ali*, 28 C.L.J. 163, 40 I.C. 234.

Time runs under this Article from the date of dismissal of the appeal, and not when the appellant has knowledge that his appeal has been dismissed—*Bissa Mal v. Kesar Singh*, 1 Lah. 363 (364), 58 I.C. 789. A comparison between Arts. 163 and 168 on the one hand and Arts 164 and 169 on the other, will show that while for a plaintiff or appellant seeking to set aside an *ex parte* decree or order limitation runs only from the date of the decree or order, the starting point of limitation in case of a defendant or respondent seeking such relief, where he has not had due notice, is the date of his knowledge of the decree or order—*Ibid*.

The provisions of section 6 do not apply to an application under this Article—*Sonubai v. Shivajirao*, 45 Bom 648 (653), 60 I.C. 919.

The period of limitation prescribed by this Article cannot be extended under sec. 5 on any ground whatsoever—*Krishnasami v. Chengalroya*, 47 Mad 171, 76 I.C. 886, A.I.R. 1924 Mad. 114; *Mahi v. Jiwan*, 141 P.R. 1879. And so, after the expiry of 30 days from the date of the dismissal, the order of dismissal becomes final. If after the expiry of 30 days the appellant applies for re-admission of the appeal, and the appeal is re-admitted and heard, all the proceedings subsequent to such application, including the re-admission of the appeal, must be set aside as invalid—*Kabir v. Khwaja Md. Khan*, 44 P.R. 1882.

But though an application for re-admission of the appeal is time-barred under this Article, it is open to the Court in a proper case to deal with the application under sec. 151 of the C. P. Code, in the exercise of the inherent powers of the Court, and the statute of limitation will have no application to the exercise of such powers—*Sonubai v. Shivajirao*, 45 Bom. 648 (653). But the Madras High Court dissents from this view in *Krishnasami v. Chengalroya*, 47 Mad 171, 45 M.L.J. 813, A.I.R. 1924 Mad 114, 76 I.C. 836.

Default of prosecution:—If on the day fixed for the hearing of the appeal, a pleader appears for the appellant, but he cannot argue the case and applies for an adjournment on the ground that the main pleader engaged by the appellant has gone elsewhere, held that the appearance of a pleader who is instructed only to apply for an adjournment is no appearance; consequently, if the application for adjournment is not granted and the appeal is dismissed, such a dismissal amounts to dismissal for want of prosecution (and not a dismissal on the merits)—*Satish Chandra v. Ahara Prasad*, 34 Cal. 403 (417) (F.B.), *Cf. Latta Prasad v. Nanda Kishore*, 20 All. 66, and other cases cited in Note 659 under Article 163. *Contra*—*Patinhare v. Vellur Krishna*, 26 Mad. 267.

169.—For the rehear- Thirty The date of the decree
ing of an appeal days. in appeal, or, where
heard *ex parte*. notice of the appeal
was not duly served,
when the applicant
has knowledge of
the decree.

676. Change :—The words "or where notice... decree" has been added in 1908. In view of this change, the case of *Venkobachar v. Ragavendrachar*, 18 M.L.J. 96 which decided that this Article had no application where the respondent had no notice of the appeal, is no longer good law.

677. Scope :—This Article applies only to an application for the rehearing of an appeal heard *ex parte*. An application to set aside an original decree which was passed *ex parte* falls under Article 164 and not under Article 169, even though the application is made to the appellate Court—*Sankara v. Subraya*, 30 Mad 535 (536).

This Article does not apply where the appeal was heard *ex parte* by reason of the non-appearance of the respondent owing to his death. So, if, while the appeal was being heard, the respondent died, and an *ex parte* decree was passed in favour of the appellant, the legal representative of the respondent would get the usual period of six [now three] months (Art 177) for applying to be brought on the record, and Article 169 would not bar such application—*Daulat Rai v. Jagat Ram*, 96 P.R. 1918, 47 I.C. 962

678. Starting point of limitation :—Where notice has not been duly served, the period of limitation runs from the time when the applicant has knowledge of the decree in appeal—*Daulat Rai v. Jagat Ram*, 96 P.R. 1918, 47 I.C. 962.

The Court has no power to extend the time prescribed by this Article—*Sher v. Mohan Singh*, 66 P.R. 1885

An application for rehearing of an appeal presented originally within the period of limitation but returned for amendment and again presented after amendment after the period of limitation, cannot be rejected as out of time. The amendment relates back to the original presentation—*Shama Prasad v. Taki Mallik*, 5 C.W.N. 816 (817)

Where the application for rehearing of an appeal has been presented after 30 days, the applicant cannot evade Article 169 by calling his application an application for review of judgment. Such a practice would make this Article a dead letter—*Santa v. Arjun Das*, 131 P.W.R. 1912, 13 I.C. 318. Cf. *Lal Devi v. Amar Nath*, 57 I.C. 15 (Lah.)

170.—For leave to ap- Thirty The date of the decree
peal as a pauper. days. appealed from.

679. An application for leave to appeal as a pauper must be presented within 30 days as prescribed by this Article. Even if an appeal is at first presented within time on an insufficient Court-fee, and then on demand by the Appellate Court to pay full Court-fee the appellant applies for leave to appeal as a pauper, after the period of limitation prescribed by this Article, the application will be barred—*Mahadev v. Lakshman*, 19 Bom. 48 (50). So also, where a memorandum of appeal was presented to the High Court within 90 days but beyond thirty days, on an insufficient Court fee, and upon demand made by the Court to pay the deficiency the appellant stated that he was unable to pay it and prayed that the memorandum of appeal should be treated as an application for leave to appeal as a pauper, it was held that the memo. of appeal, not having been presented within 30 days as required by this Article, could not be treated as an application for leave to appeal as a pauper.—*Gati v. Rachla Kunwar*, 13 A.L.J. 635, 29 I.C. 1003.

Section 5 of the Act of 1877 was not applicable to an application for leave to appeal as a pauper, so that the Court could not grant time on any sufficient cause—*Parbati v. Bhole*, 12 All. 79. But under the present Act, that section has been extended to an application for leave to appeal.

This Article applies to an application for leave to appeal as a pauper, and not to an application for leave to file cross-objections *in forma pauperis*. A cross-objection may be filed within 30 days from the date of service of the notice of the appeal (O. 41, r. 22, C. P. Code) and if the memorandum of cross-objection is presented within time, the application for leave to file the cross-objection *in forma pauperis* may be accepted by the Court at any time—*Govind v. Radha Ballabh*, 15 C.W.N. 205 (211), 12 C.L.J. 173, 7 I.C. 113; *Chander Kala v. Dulhin Raja Kuer*, 7 Pat. 827, 10 P.L.T. 387, 119 I.C. 900, A.I.R. 1929 Pat. 31 (32).

Where an application for leave to appeal as a pauper is refused, the Court should grant a reasonable time to the appellant for paying the stamp-duty on the memorandum of appeal and if he pays the Court fee within the time allowed, the appeal must be deemed to have been filed as on the original date of presentation of the application for leave to appeal as a pauper—*Nallavadiva v. Subramania*, 40 Mad. 687 (697). The Limitation Act prescribes the same period of limitation by Arts. 152 and 170 respectively for the filing of an appeal itself and for the filing of an application for leave to appeal as a pauper, so that the result would often be that in every case where the pauper application happens to be refused, there would be no time to file a regularly stamped appeal within the period of limitation. Therefore the Court, while dismissing an application for leave to appeal *in forma pauperis*, should grant time to the appellant within which to file his appeal, and if he files his appeal within that period, the appeal is in time—*Bai Ful v. Dessai*, 22 Bom. 849 (856); see also *Girwar v. Lakshmi*, 26 All. 329.

171.—Under the Code Sixty The date of the abatement of Civil Procedure, days. ment.

1908, for an order
to set aside an
abatement.

Articles 171 and 172 of the present Act together correspond to Art. 171 of Act XV of 1877.

680. This Article did not originally occur in the Act of 1877 but was added by the Amendment Act XII of 1879. Prior to the introduction of this Article, it was held that an application to set aside an order of abatement was governed by the three years' rule under Article 178 (now Article 181)—*Bhojrub v. Doman*, 5 Cal. 139. This decision must be deemed as overruled by this Article.

An application to set aside an order of abatement must be made within sixty days under this Article: otherwise it will be barred—*Lakshmi Chand v. Kachubhai*, 35 Bom. 393 (395), *Bhanu Ram v. Narain*, 1916 P.W.R. 12, 31 I.C. 697; but the period of limitation under this Article may be extended, if the applicant can show sufficient cause for the delay under sec. 5. See C. P. Code, O. 22, rule 9 (3). See also *Bhanu Ram v. Narain*, supra; and *Kandasami v. Murugappa*, 16 M.L.T. 547, 26 I.C. 472. In 35 Bom. 393 (395) the application of the son of the deceased plaintiff, who died after the decree for partition was passed but before the partition was carried out in accordance with the decree, to set aside the order of abatement was dismissed as it was presented beyond the period, but the Court exercising its inherent powers to make such orders as may be necessary in the ends of justice, directed that he should be made a defendant, as it was a partition suit in which all parties should be before the Court, and the presence of the deceased plaintiff's son was necessary in order to enable the Court to effectively conduct the partition proceedings.

If no application for substitution is made within the period of six months (now three months) prescribed by Article 176 or 177, the suit will abate (vide O. 22, r. 4, C. P. Code), but it will be open to him to make an application under O. 22, r. 9 (2) to set aside the order of abatement (within 2 months from the date of abatement)—*Lachmi Narain v. Md. Yusuf*, 42 All. 540 (541), 59 I.C. 903; *Secretary of State v. Jawahir*, 36 All. 235 (237). Where an application to set aside the order of abatement and to revive the suit was made by the legal representatives of the plaintiff more than six months (but within eight months) after the plaintiff's death, the proper procedure for the Court would be first to declare the suit to have abated, and then at once to pass an order setting aside the abatement and reviving the suit, if sufficient cause was shown for setting aside the order of abatement—*Rani Pratap v. Lal Chand*, 9 C.W.N. 309 (370); *Fulbaha v. Goculdas*, 9 Bom. 275 (277), *Lachmi Narain v. Md. Yusuf*, 42 All. 540 (541).

681. Application by reversioner.—The nearest reversioner to the estate of a deceased Hindu instituted a suit to declare certain alienations made by the widow as void beyond her lifetime, and died

pending the hearing. Within six months of his death and without hearing any others among the surviving body of reversioners, the lower Court passed an order declaring that the suit had abated. Nearly two years after, the next reversioner applied to set aside the abatement, to be brought on the record as the legal representative of the deceased, and to be allowed to continue the suit. *Held* that a suit brought by a reversioner is one really brought on behalf of the entire body of reversioners; if the reversioner dies, the next reversioner can continue it; the suit does not abate because the next reversioner must be deemed to have been already a party thereto; the present application to continue the suit is not an application to set aside the abatement (because the order of abatement is invalid and need not be set aside) but an application under O. 1, rules 1 and 8 (2), and is governed not by this Article but by Article 181—*Krishnaswamy v. Seetalakshmi*, 1918 M.W.N. 888, 9 L.W. 166, 49 I.C. 268.

- 172.—Under the same Code by the assignee or the receiver of an insolvent plaintiff or appellant for an order to set aside the dismissal of a suit or an appeal. Sixty days. The date of the order of dismissal.

This was Article 171 of the Act of 1877.

- 173.—For a review of judgment except in the cases provided for by Article 161 and Article 162. Ninety days. The date of the decree or order.

682. Before the enactment of Article 161, an application for review of a judgment of a Small Cause Court was governed by this Article; see *Modan v. Purna*, 10 Cal. 297 (298). Now it falls under Article 161.

This Article applies where a review, and not a new trial, is the proper remedy—*Ibid*.

An application for a review of the High Court's decree (appellate) must be presented within 90 days of the decree, and every day's delay over that period must be duly accounted for—*Ramaswami v. Venkatasarasimha*, 3 L.W. 244, 32 I.C. 1000.

This Article is restricted to an application for review under the C. P. Code, and does not apply to an application under sec. 8 (1) of the Presidency Towns Insolvency Act, for review of judgment passed by the High Court in its Insolvency jurisdiction—*In re Nassee*, 7 Rang. 201, A.I.R. 1929 Rang. 229 (232) 118 I.C. 615.

Time runs from the date of the decree or order, and not from the date when the applicant made a discovery of a new evidence which is the ground for review. But the Court can extend the time for sufficient cause—*Debi Dayal v. Ambika*, A.I.R. 1929 All. 545 (547), 119 I.C. 99. Nor does time run from the date when the applicant came to have knowledge of the decree or order. In such a case, it would be open to the applicant to apply for an extension of time under sec. 5, if in fact he could prove that he had no knowledge of the decree or order within 90 days before the application—*Baldeo v. Sukhdas*, A.I.R. 1929 All. 485 (488), 121 I.C. 552.

174.—For the issue of Ninety days. When the payment or a notice under the same Code, to show cause why any payment made out of Court of any money payable under a decree or any adjustment of the decree should not be recorded as certified.

This Article corresponds to Art 173A of Act XV of 1877.

683. The application referred to in this Article is an application under O XXI, rule 2 (2) of the C. P. Code, made by the judgment-debtor. This Article has no application where the decree-holder takes steps under O. 21, r. 2 (1) to report satisfaction *suo motu*—*Gopal Das v. Gangaram*, 1888 A.W.N. 115. The decree-holder may apply at any time for having the payment or adjustment certified to the Court—*Tukaram v. Babaji*, 21 Bom 122 (124). A judgment-debtor who pleads payment or adjustment must issue notice upon the decree-holder within 90 days of the payment or adjustment, before he can certify payment. But there is no corresponding obligation imposed upon the decree-holder. He may certify payment at any time before execution or he may do so in his application for execution—*Eusufzeman v. Sanchis*, 43 Cal. 207 (210); *Sheikh Elahi v. Nawab Lal*, 4 P.L.J. 159 (169), 50 I.C. 364; *Jatindra v. Gagan Chandra*, 46 Cal. 22 (24), 45 I.C. 903, *Balay Md. v. Aijamal*, 26 C.W.N. 529, A.I.R. 1922 Cal 30, 68 I.C. 780; *Bhajan Lal v. Cheda Mal*, 12 A.L.J. 825, 24 I.C. 215. O. 21, r. 2 contemplates that the decree-holder should certify the payment within a reasonable time in order that it might be recorded by the Court, and the judgment-debtor is protected by the provision that in the event of the decree-holder failing to certify the payment to the Court, the judgment-debtor may apply to the Court under O. 21, r. 2 (2) for a notice to issue to the

decree-holder to show cause why the payment should not be recorded as certified, provision thereof being made under Art. 174 that such application should be made within 90 days of the payment. In view of these provisions, apparently, it was not thought necessary to provide any specified time within which the judgment-creditor must certify the payment under O. 21, r. 2 (1)—*Shri Prakash v. Allahabad Bank*, 3 Luck. 684 (P.C.), 27 A.L.J. 33, 31 Bom. L.R. 289, 33 C.W.N. 267 (273), 56 M.L.J. 233, A.I.R. 1929 P.C. 19, 114 I.C. 581. But he must certify within such time as is required to save the decree from limitation—See Note 691 under Art. 181, at pp. 732-733 *post*.

This Article applies to an application made by the representative of the judgment debtor. He is bound to apply within the period prescribed by this Article—*Panduranga v. Vythilinga*, 30 Mad. 537 (540).

If the judgment-debtor makes any payment or adjustment towards the decree, but no application is made to get it certified within the period prescribed by this Article, the judgment-debtor will not be entitled to obtain credit for those payments or to set up the payment or adjustment as a bar to the execution of the decree. See O. 21, r. 2 (3), C. P. Code. He cannot evade the provisions of this Article by securing investigation of the same matter under section 47, C. P. Code during the execution proceedings—*Panduranga v. Vythilinga*, 30 Mad. 537 (540); *Golam Muzuffar v. Goloke Charan*, 25 I.C. 884 (Cal.); *Kutubulla v. Durga Charan*, 16 C.W.N. 396 (397), 13 I.C. 424; *Mukunda Lal v. Bansidhar*, 50 Cal. 468 (473), A.I.R. 1923 Cal. 342, 76 I.C. 311; *Nistarini v. Kasim Ali*, 12 C.L.J. 65, 7 I.C. 258; *Maroti v. Narayan*, A.I.R. 1925 Nag. 374; *Jogendra v. Probhat*, 19 C.W.N. 650, 19 C.L.J. 126, 21 I.C. 926; *Monmohan v. Dwarka Nath*, 7 I.C. 55, 12 C.L.J. 312; *Kamini Devi v. Aghore Nath*, 14 C.W.N. 357, 11 C.L.J. 91; *Mulchand v. Champa*, 26 P.L.R. 250, A.I.R. 1925 Lah. 566, 87 I.C. 635. If he were allowed to do so, the provisions of Article 174 would be rendered nugatory—*Kamini Devi v. Aghore Kumar*, (supra); *Mukunda v. Bansidhar*, (supra). The Bombay High Court once took a contrary view in *Trimbak v. Hari Laxman*, 34 Bom. 575 (580), where Heaton J. observed (by way of obiter) that the usual way in which the judgment-debtor informs the Court of a payment or adjustment is that when the decree-holder applies for execution he (the judgment-debtor) pleads a payment or adjustment, and if the Court were debarred from enquiring into the payment or adjustment on the ground that it is uncertified, the effect would be to encourage fraud on the part of the decree-holder. The same view was expressed in another Bombay case—*Hansa v. Bhawa*, 40 Bom. 333 (336). But this view has been overruled by the Full Bench in *Mehdunissa v. Mehdunissa*, 49 Bom. 548 (F.B.), 27 Bom. L.R. 403, A.I.R. 1925 Bom. 309, 95 I.C. 687, where it had been said that the words of O. 21, r. 2 (3) are plain and unambiguous, and that the executing Court is debarred from considering any allegation that a payment not certified has been made.

This Article speaks of *payment*, and obviously refers only to money decrees and not to decrees for possession of immoveable properties; an

application to record delivery of land made out of Court is not governed by this Article—*Sankaran v. Kanara*, 22 Mad. 182 (186). So also, this Article does not apply where the decree is not a decree for payment of money but a mortgage-decree for sale in case the money due is not paid—*Mallikajurna v. Narsimha*, 24 Mad. 512 (514). This Article refers to sec. 258 C. P. Code 1882 (O. 21, r. 2), and that section does not apply to an application made under sec. 89 Transfer of Property Act (now O. 34, r. 5, C. P. Code); therefore the limitation prescribed by this Article does not apply to any payment made before a final decree is made; and the defendant is not debarred from setting up the plea of payment—*Hatem Ali v. Abdul Guffur*, 8 C.W.N. 102 (104) But see *Nistarini v. Kasim Ali*, 14 C.W.N. 357, 4 I.C. 402.

Where under the terms of a decree the decree-holders remained in possession of the property, the amounts received by the decree-holders were not "money payable under decree"; consequently these receipts need not be certified to the Court within 90 days from the date on which they were received—*Yella Reddi v. Syed Muhammadali*, 39 Mad. 1026 (1027); *Vaidhinathasamy v. Somasundaram*, 28 Mad. 473 (478) (F.B.).

[Art. 174 of the old Act of 1877 provided for an application by a creditor of an insolvent judgment-debtor under sec. 353 of the C. P. Code 1882. But after the law relating to insolvents was transferred from the C. P. Code to the Insolvency Acts, Art. 174 of the Limitation Act of 1877 was repealed. And since the Provincial Insolvency Act prescribes no period of limitation for application by the creditor of an insolvent to be brought on to the schedule of creditors, such applications are not barred by any rule of limitation, and the matter is left to the discretion of the Insolvency Court—*Jhan Bahadur v. Bailiff*, 5 Rang 384, A I R. 1927 Rang. 263 (264), 104 I C. 816]

175.—For payment of Six The date of the decree.
the amount of a months.
decree by instal-
ments.

This Article refers to an application made by the judgment-debtor under O. 20, rule 11 (2), C. P. Code

176.—Under the same Ninety The date of the death
Code to have the days. of the deceased plain-
legal representative tiff or appellant.
of a deceased plain-
tiff or of a deceased
appellant made a
party.

This Article corresponds to Article 175A of the Act of 1877.

684. By Sec. 2 of the Indian Limitation and C. P. Code Amend-
ment Act (XXVI of 1920) the period of limitation has been reduced from

"six months" to "ninety days." But where an appellant had died before the Amendment Act came into operation, his legal representative would get six months' time under this Article as it stood before the amendment—*Ajit Singh v. Bhagabati*, 36 C.L.J. 263, A.I.R. 1922 Cal. 291, 70 I.C. 370.

It is interesting to note the changes in the period of limitation. This Article did not exist in the Act of 1871, and the period of limitation for the application was probably 3 years under the general Article. It appeared for the first time in the Act of 1877, and the period allowed was sixty days, then in 1888 the period was extended to six months. This period was retained in the Act of 1908 until recently it has been curtailed to 90 days. The same remarks apply also to Article 177.

Applications governed by this Article are applications made in the course of the suit. If the plaintiff died after having obtained (under S. 88 T. P. Act) a decree for sale on a mortgage and his sons applied more than six months after their father's death, to be brought on the record in the place of the deceased and to have an order absolute for sale made in their favour, held that as the suit was at an end when the conditional decree for sale was passed, the application was not one made in the course of the suit; this Article therefore did not apply and the application was not barred—*Mehar Bibi v. Yakub*, 11 C.W.N. 156 (157, 158).

The words 'plaintiff or appellant' show that this Article applies to applications made in the course of a suit or an appeal, and not to applications made during execution proceedings. Thus, it does not govern an application made by the representative of a deceased decree-holder claiming admission to continue the execution proceeding commenced by the deceased. The execution proceeding does not abate on the decree-holder's death; consequently his representative may come in at any time—*Gulab Das v. Lakshman*, 3 Bom. 221; *Dulari v. Mohan Singh*, 3 All. 759. See also *Jagattarini v. Rakhal*, 10 C.L.J. 398, 3 I.C. 324. But he must of course apply within the period of limitation prescribed by Article 182—*Dulari v. Mohan Singh*, (supra).

So also, this Article does not govern an application made by the representatives of a plaintiff coming in to appeal, where the plaintiff has died after decree. The representative has the same period to make his appeal as the plaintiff himself would have had—*Ramanada v. Minatchi*, 3 Mad. 236.

Where there are two rival claimants, the right to be brought on the record vests in the one or the other rival claimant from the date of death of the deceased party. The limitation therefore begins to run against both the rival claimants and each would get barred by time at the expiry of the limitation prescribed by Art. 176. One rival claimant who has not applied to be brought on the record within the limitation period, cannot continue a suit revived by his rival's application in time as the proceedings initiated by one rival claimant can never have been intended to enure for the other's benefit. The principle is that where each claims the benefit to

continue the suit exclusively to himself, the case is one of clear antagonism between them, and one cannot be said to represent the other at all in the matter of substitution of names—*Amritbas v. Rutanlal*, A.I.R. 1927 Nag. 343, 104 I.C. 398. But the matter would be different if both of them had a joint right to sue or to continue the suit in their joint names, and only one of them had sued or applied for substitution under a *bona fide* belief that he or she was or could be the sole plaintiff or sole legal representative—*Ibid.*

177.—Under the same Ninety The date of the death
Code to have the days. of the deceased de-
legal representative fendant or respon-
of a deceased de- dent.
fendant or of a de-
ceased respondent
made a party.

This Article corresponds to Art. 175C of the Act of 1877.

685. Change :—The period of limitation has been reduced from six months to 90 days by section 2 of the Indian Limitation and C. P. Code Amendment Act (XXVI of 1920), and by the Amending and Repealing Act 1923 (XI of 1923).

Section 2 of the Act XXVI of 1920 ran as follows :—

"In the Third Division of the First Schedule to the Indian Limitation Act 1908, in Articles 176, 178 and 179, for the word "Ditto" in the second column, the words "Ninety days" "Six months" and "Ninety days" respectively shall be substituted."

It should be noted however that though this section made no mention of Article 177, its effect was to alter the period of six months provided by this Article into ninety days; for by retaining the "Ditto" in Article 177 and changing the 'Ditto' in Article 176 to 'Ninety days,' it practically prescribed 90 days for Article 177.

But as no mention was made of Article 177 in the above section, the Lahore High Court (as well as other High Courts) held that the Amendment Act XXVI of 1920 did not reduce the period of limitation of Article 177, as no mention of that Article was made in the body of the Amendment Act, though there might be mention of it in the Statement of Objects and Reasons—*Govind Das v. Rup Kishore*, 4 Lah. 367; *Rup Kishore v. Bhagat Govind Das*, A.I.R. 1922 Lah. 211, 69 I.C. 748; *Arjun Das v. Nanak Chand*, 78 I.C. 771; *Skinner v. Makarram Ali*, 92 I.C. 330, A.I.R. 1925 All. 77; *Subramania v. Shanmugam*, 49 M.L.J. 363, 92 I.C. 566, A.I.R. 1926 Mad. 65; *Rai Brijnandan v. Mahabir*, 97 I.C. 316. The same argument was advanced by Counsel in the Calcutta High Court case of *Seodojyal v. Joharmull*, 50 Cal. 549, 75 I.C. 81.

In view of this interpretation, this Article has been amended by sec. 2 of the Amending and Repealing Act 1923 (XI of 1923) as follows :—

"2. In the Third Division of the First-Schedule to the Indian Limitation Act, 1908, in Articles 176, 177, and 179, for each of the entries in the second column, the entry "ninety days" shall be substituted....." See *Gazette of India* 1923, Part IV. p. 54.

The reasons have been thus stated: "This amendment is designed to correct a drafting error which had the effect of leaving the period of limitation in Article 177 as six months though the intention was to reduce it to ninety days." "In a recent case before the High Court of Judicature at Lahore a doubt arose as to the effect of amendments made by Act XXVI of 1920 in the period of limitation prescribed in items 176, 177 and 179 of the Schedule. The object of the present amendment is to substitute for the 'Dittos' the actual periods prescribed"—*Gazette of India*, 1923, Part V, pp. 93, 94.

Moreover, to prevent further misconceptions in the future, the Amending and Repealing Act of 1923 has omitted all 'Dittos' from the 2nd columns of all the Articles of the Limitation Act, and substituted the actual periods of limitation.

686. Scope. :—This Article refers to applications under O. 22 rules 4 and 11, C P Code 1908 (secs. 368 and 582, C. P. Code, 1882). But it does not refer to an application under O. 22, rule 2 (sec. 362 of the old Code). Thus, where one of several respondents dies and the right of appeal survives against the surviving respondents alone, an application for a declaration (under O. 22, rule 2) that the surviving respondents are the legal representatives of the deceased and that the appeal shall proceed against them does not fall under this Article. It would be governed by the general Article 181—*Shamanund v. Rajnarain*, 11 C W N. 186 (188).

The Article applies to applications made in the course of a suit or an appeal, and does not apply to an application for substitution made in execution proceedings. Such an application may be made beyond six months, and the execution proceedings will not abate—*Amolak Ram v. Shanu Ram*, 174 P.L.R. 1911, 10 I.C. 405. So, where after attachment of the judgment-debtor's property in execution of a decree, the judgment-debtor dies, the decree-holder is not bound to bring upon the record the legal representative of the judgment-debtor. He can execute the decree against the legal representative of the deceased, so long as execution is not barred by limitation—*Bhagwan Das v. Jugal Kishore*, 42 All 570 (1913), 18 A.L.J. 735, 57 I.C. 610.

This Article does not apply where the defendant dies after the decree in a suit but before any final order has been passed, and his legal representatives apply to be brought on the record in the further proceedings taken in pursuance of the decree. To such a case Art. 181 applies, and as it is an application in a 'pending suit' within the meaning of section 372 C. P. Code (for as there has not been any final order, the suit must be treated as pending) the right to apply under Article 181 accrues from day to day and the application is not barred, even though made more than three years after defendant's death—*Surendra Keshab v. Kheller*

Krishto, 30 Cal. 609 (following *Kedar Nath v. Harra Chand*, 8 Cal. 420). The *ratio decidendi* of the judgment is not very clear. It is difficult to understand why section 372 C. P. Code was applied instead of sec. 368, which is in fact more appropriate here, for that section refers to devolution of interest by *death*, whereas sec. 372 refers to *other cases* of devolution of interest.

In another Calcutta case it was held that if during the pendency of a suit to recover land a sole defendant died, the plaintiff's application to bring in the legal representative of the deceased fell under section 372 C. P. Code (now O. 22, rule 10) and not under section 368 (now O. 22, rule 4) and that the applicant had three years to make the application under Article 178 (now 181) of the Limitation Act—*Benode Mohini v. Sarat*, 8 Cal 837. The learned Judge in this case gave a very pedantic interpretation to the expression "right to sue" occurring in section 368, and held that that expression was used in the Code in the sense in which the term "cause of action" had an accepted meaning in the English Judicature Act, i.e., it was used with reference to personal actions for damages, for breach of contract or for tort, and did not apply to suits for recovery of land; and that if a devolution of interest took place by death in a suit relating to possession of land, the case would come not under section 368 but under the general provisions of section 372 which relate to "creation, assignment or devolution of interest." This case has been dissented from by the other High Courts in *Ojagar v. Niamat*, 1890 A.W.N. 21, *Jamnadas v. Sorabji*, 16 Bom 27, and *Jafar v. Jawaya*, 76 P R. 1884. The Punjab Chief Court points out that the expression "cause of action" or "right to sue" means any cause of action whether the suit be for damages for personal property or for immoveable property or for some peculiar relief—*Jafar v. Jawaya*, (supra). Further, since the expression used in the Judicature Act is "cause of action" whereas the C P. Code uses the simpler expression "right to sue," this latter expression should be taken in its ordinary acceptation and not in the highly technical sense in which the former expression is used in the English Act. Moreover, as pointed out in the Bombay case, section 368 specifically provides for a case where a defendant or sole defendant *dies*, whereas sec. 372 refers to "*other cases* of creation, assignment or devolution of interest"—*Jamnadas v. Sorabji*, 16 Bom. 27 (28).

This Article equally applies to an application for substitution made in the course of a *second appeal* as well as in the course of a first appeal, and is not restricted to applications made during first appeals only. Thus, where the respondent in a second appeal died during the pendency of the appeal, an application by the appellants to substitute his heirs on the record is governed by the six months' rule under Art 177, and not by the three years' rule of Art 181—*Upendra v. Sham Lal*, 34 Cal 1020 (1023); *Madhuban v. Narain Das*, 29 All. 535 (536); *Sheikh Adam v. Balaji*, 10 Bom L.R. 509. The Madras High Court, however, held that the period of limitation for bringing the legal representative of a deceased respondent in second appeal was three years and not six months—*Susya Pillai v.*

Aiyakannu, 29 Mad. 529 F.B. (overruling *Vakkalagadda Narasimham v. Vahizulla*, 28 Mad. 498). This conflict of opinion was due to the defective language of Article 175C of the Act of 1877, the first column of which ran thus: "Under sec. 368 of the Code of Civil Procedure, to have the legal representative of a deceased defendant made a defendant, or under that section and section 582 of the same Code, to have the legal representative of a deceased plaintiff-respondent or defendant-respondent made a plaintiff-respondent or defendant-respondent." Thus, the words "*plaintiff respondent*" and "*defendant respondent*" led the Madras Court to hold that this Article was restricted to first appeals only. The language of the present Article is quite general and the word '*respondent*' undoubtedly includes a respondent in second appeal.

An application made after the passing of the Act of 1908 to bring the legal representative of the deceased respondent who had died during second appeal while the Act of 1877 was in force, will be governed by the six (now three) months' rule under the present Article, and not by the three years' rule (which was the opinion of the Madras High Court; see 29 Mad. 529 *supra*) of the Act of 1877. This cannot cause any hardship to the applicant, for though the new Limitation Act had been passed on the 7th August 1908, the period of its coming into operation was postponed till the 1st January 1909; and the applicant could have made his application during this intervening period. If he has not done so, his application must be dismissed as barred. Even the benefit of section 30 did not avail to the applicant as that section referred to suits and not to applications—*Arayil v. Sankaran*, 34 Mad. 292 (293, 294). 20 M.L.J. 347, 5 I.C. 420.

Extension of time for sufficient cause:—Under section 372A of the C. P. Code, 1882 (O. 22, r. 9, C. P. Code 1908), sec. 5 of the Limitation Act was made applicable to applications under sec. 368A of that Code (O. 22, r. 4 of the present Code), so that an application for substitution could have been made beyond the period of six months prescribed by Article 175C, if there was sufficient cause for delay, as section 368 of the C. P. Code in express terms gave power to the Court to enlarge the period of six months for sufficient cause shown. See *Madhuban v. Narain*, 29 All 535 (537); *Chajmal v. Jagdamba*, 11 All 408. Thus, the appellant's ignorance of the fact of the respondent's death was a sufficient cause for not making the application within the time limited—*Gaman v. Baksha*, 42 P.R. 1887; *Dadu v. Kodu*, 113 P.R. 1907. So also, where the plaintiff acting *bona fide* brought in a wrong person as the legal representative of a deceased defendant within time, but came to know of the error more than six months after the death of the defendant, and then applied to have the right person brought on the record, his latter application would not be barred—*Syed Hossein v. Abdur Rahim*, 7 C.W.N. 529. But under the Civil Procedure Code of 1908, the law has been changed, for under O. 22, rule 4, if no application for substitution is made within the time limited (now three months), the suit or appeal shall abate, and that rule gives the Court no power to enlarge the time for sufficient cause. But after abatement, it is open to the

plaintiff or appellant to make an application, under O. 22, r. 9, to set aside the order of abatement (within the period of two months prescribed by Article 171) on the ground that he was prevented by sufficient cause from making the application for substitution within time. See *Secretary of State v. Jawahir*, 36 All. 235 (237); *Lachmi Narain v. Md. Yusuf*, 42 All. 540 (541), 18 A.L.J. 688, 59 I.C. 903; *Daya Singh v. Buta Singh*, 118 P.R. 1916, 38 I.C. 7.

178.—Under the same Six The date of the award.
Code for the filing months.

in Court of an award
in a suit made in
any matter referred
to arbitration by
order of the Court,
or of an award made
in any matter referred
to arbitration
without the intervention
of a Court.

This Article corresponds to Art. 176 of Act XV of 1877

687. Scope of Article :—This Article applies only when an application is made by the parties for filing an award. The arbitrators themselves may file an award more than six months after it is made, because the act of the arbitrators in handing over the award to the proper officers of Court for the purpose of filing it is not an application for filing an award; thus Article has therefore no application to the case—*Roberts v. Harrison*, 7 Cal. 333 (336). In fact no application is necessary for the arbitrators to file an award. They can simply make over the award to the Court to be filed—*Ibid* (at p. 337).

This Article may apply to an application by a party to compel an arbitrator to file his award—*Ibid* (at p. 337)

The 'date of the award' is the date on which it is delivered to the parties, so that they may have notice of its contents and may give effect to it, and not the date on which it is actually written and signed—*Sreenath Chatterjee v. Koylash Chunder*, 21 W.R. 248. When the award is not delivered to the parties till some time after it is made, limitation runs from the date of the delivery. It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award from the time when he is in a position to enforce it—*Dutto Singh v. Dosad Bahadur*, 9 Cal. 575 (578). The date on which a draft award was made is not the date of the award. The draft award is not an award at all, and its publication is not the publication of the award. It is the date of the final award that is the starting point of limitation—*Kunja v. Banwari*, 4 P.L.J. 394 (410), 48 I.C. 711.

The period of limitation prescribed by this Article cannot be extended by section 5, as that section does not apply to an application for filing an award—*Ram Ugrah v. Achraj Nath*, 38 All. 85 (91), 13 A.L.J. 1115, 31 I.C. 899.

179.—By a person desiring to appeal under the same Code to His Majesty in Council, for leave to appeal. Ninety days. The date of the decree appealed from.

This Article corresponds to Article 177 of the Act of 1877.

688. By section 2 of the Indian Limitation Act and C. P. Code Amendment Act (XXVI of 1920) the period of limitation has been reduced from 'six months' to 'ninety days'. "Delays in the conduct of Indian appeals to the Privy Council have been the subject of much adverse comment in judgments of the Judicial Committee and remedial measures have been undertaken for some time past His Majesty's order in Council dated the 9th February 1920 has already been issued and the present Bill has been drafted with the object of giving legislative sanction to various further measures calculated to expedite the prosecution of those stages of these appeals which take place in India"—*Statement of Objects and Reasons* (Gazette of India, 1920, Part V, page 156). In introducing the Bill, Sir William Vincent observed :—"This Bill is intended to reduce the delays which have occurred in Privy Council appeals. It affects other cases in certain respects also. The question of these delays in the Privy Council has exercised the minds of the Secretary of State, the Government of India, and their Lordships of the Judicial Committee for some years. On many occasions the Privy Council have criticized the want of expedition in these appeals with great severity, at times they have almost become plaintive about this..... This Bill therefore provides a reduction of the period within which a person must apply for leave to appeal to the Privy Council"—*Gazette of India*, 1920, Part VI, page 1000.

689. *Extension of time*:—The period prescribed by this Article cannot be extended on account of the minority of the applicants, as section 6 does not apply to an application for leave to appeal to the Privy Council—*Thurat v. Jainilabdeen*, 18 Mad 484 (485); *Narendra v. Oudh Commercial Bank*, 5 O.L.J. 153, 46 I.C. 68 (70).

But an application under this Article may be admitted after the period on proof of sufficient cause under section 5.

The time spent in obtaining a copy of the decree sought to be appealed against as well as a copy of the judgment will be excluded under section 12, subsections (2) and (3) in computing the period of limitation. See Note 133 under sec. 12.

180.—By a purchaser of immoveable property at a sale in execution of a decree for delivery of possession. Three years. When the sale becomes absolute.

690. Scope :—This Article is new, and did not exist in the Act of 1877. It refers to an application under O. XXI, rule 95, C. P. Code.

According to the old Limitation Act, an application under section 318 C. P. Code 1882 (O. XXI, r. 95, C. P. Code 1908) by a purchaser at a Court sale to be put into possession fell under Art 178 (now 181); and time ran from the date of grant of the sale-certificate—*Hanmantrao v. Subaji Girmaji*, 8 Bom. 257, *Kashinath v. Durning*, 17 Bom 228; *Basapa v. Marya*, 3 Bom. 433, *Sultan Saheb Marayakar v. Chidambaram*, 32 Mad. 136, according to the Allahabad High Court, time ran from the date of confirmation of the sale—*Ranjit v Baldeo*, 30 All 390.

But now such an application falls under this Article which specifically provides for the case, and not under the general Article 181—*Viswasundara v. Paidigadu*, 50 M L J 72, A I R 1926 Mad 385, 91 I C 485

Where a sale was confirmed before the Limitation Act of 1908 came into force, but the application for possession of the purchased property is made after the coming into operation of the new Act, it is governed by Art. 180 and is barred if not brought within three years from the date when the sale became absolute—*Hussain Bux v. Becha*, 27 I.C 420 (Cal); *Arunagiri v. Uthando*, 12 M.L.T 311, 17 I.C 242.

An application by a *decree-holder-purchaser* for delivery of possession of the properties purchased by him in Court-auction is not an application to execute the decree under Article 182 but is governed by this Article—*Ramasami v Abdul Aziz*, 19 M L T. 164, 32 I C. 993 (following 32 Mad. 136). See also the recent Calcutta case *Neckbar v Prakash*, 56 Cal. 608, A I R. 1930 Cal. 86 (87), 120 I C 107, where the application was by the decree-holder-purchaser, and Art 180 was held to be applicable. The Nagpur Court is of opinion that such an application falls under sec. 47 C. P. Code, *i e* , it is a matter relating to the execution, discharge or satisfaction of the decree, and is governed by Article 182, and not by Article 180. Where the auction-purchaser is the decree-holder himself, and he presents an application for possession, he occupies therein, in reality, a dual position. He is, from one point of view, the auction-purchaser applying to be put in possession of his property, while from another point of view he is the decree-holder claiming to have his decree fully satisfied by having, so to speak, the proceeds of the decree made over to him—*Balaji v. Anandrao*, A I.R 1927 Nag. 294, 103 I.C. 335. As to whether such application amounts to a step-in-aid of execution, see Note 715 in Art. 182, under sub-heading "*To be put into possession.*"

This Article refers to applications; a similar suit is governed by Article 137 or 138. The mere fact that an application by a purchaser for delivery of possession is rejected as made beyond the period of 3 years is no bar to a suit for possession, the period for which is twelve years—*Sheo Narain v Nur Muhammad*, 29 All. 463 (466); *Seru Mohan v. Bhagaban*, 9 Cal. 602; the purchaser may proceed either by a suit or by an application—*Ishwar v. Jai Narain*, 12 Cal. 169; *Sevu v. Muthuswami*, 10 Mad. 53; *Kishori Mohun v. Chunder Nath*, 14 Cal. 644. As regards the question whether a suit for possession is maintainable where the decree-holder is himself the purchaser, see Note 581 under Article 138.

690A. Limitation.—The sale to a decree-holder-purchaser was confirmed in 1911. He made an application in 1913, which resulted in an order "Deliver" passed on 7-7-13, but on 30-7-13 the Court ordered on the same petition "No one to take delivery; petition dismissed." In 1915 the purchaser again applied for delivery of possession. It was held by *Abdur Rahim J.* (*Oldfield J. contra*) that the order of dismissal on 30-7-13 not having been made after hearing the purchaser, it must be deemed to be a dismissal only for statistical purposes, and that the application of 1915 might be treated as one for the execution of the general order for delivery made in 1913, and being in that view a continuation of the prior proceeding, was not barred by Article 180. *Oldfield J.* however held that the prior application having been dismissed on account of the purchaser's default, the prior proceedings could not be held to have continued thereafter, and that the application of 1915 could not therefore be regarded as a continuation of the previous application passed in the prior execution proceeding—*Nandur Subbaya v. Rajah Venkatramayyah*, 1918 M W N 214, 43 I.C. 155, 7 L.W. 16. The view of *Oldfield J.* has been followed in the recent case of *Viswasundara v. Paidigadu*, 50 M L J 72, A.I.R. 1926 Mad 385, 91 I.C. 485.

The period of limitation runs from the date on which the sale 'becomes absolute'. A sale does not necessarily become absolute as soon as it is confirmed. Thus, where a sale is confirmed without opposition, but afterwards a petition is made under O. 21, r. 90 to set aside the sale, the period of limitation for an application under this Article begins to run from the date of the order disallowing the petition to set aside the sale, and not from the date of the first confirmation, because the sale does not become absolute within the meaning of this Article¹ until the application to set aside the sale has been disallowed and the sale upheld, though the order confirming the sale had been passed before the application to set aside the sale was made—*Muthukorakkai v. Madar Ammal*, 43 Mad. 185 (197, 198) (F.B.) virtually overruling *Arunagiri v. Uthando*, 12 M L T. 311, 17 I.C. 242. But the Calcutta High Court dissents from this view and holds that the period of limitation runs from the date of the confirmation of the sale under O. 21, r. 92, and the fact that the judgment-debtor afterwards makes an application under O. 21, r. 90 to set aside the sale,

does not entitle the auction-purchaser to compute the period from the date of the final dismissal of that application; because the mere fact that the judgment-debtor has made an application for setting aside the sale does not prevent the purchaser from making his application for delivery of possession—*Neckbar v. Prakash*, 56 Cal 608, A.I.R. 1930 Cal. 87 (89), 120 I.C. 107 (dissenting from 43 Mad. 185, and distinguishing *Bajinath v. Ramgut*, 23 Cal. 775 P.C.). In this case (56 Cal. 608) the learned judge did not consider it necessary to decide whether the purchaser's right to apply for delivery of possession was *suspended* during the pendency of the judgment-debtor's application to set aside the sale, because even then the application was barred.

✓ An execution sale was confirmed in April 1908, but the judgment debtor appealed and the appeal was compromised, the judgment-debtor agreeing to pay the decretal amount in June 1910, upon which the sale was to be set aside. He paid nothing, and in July 1912 the decree-holder purchaser applied for delivery of possession. Held that the compromise on appeal had the effect of suspending the right of the decree-holder-purchaser to apply for delivery of possession; and the right was revived on June 1910 when the judgment-debtor failed to pay under the terms of the compromise, and that therefore the present application was not barred—*Janak Prasad v. Net Ram*, 22 I.C. 497 (Cal.).

In computing the period of limitation under this Article, the time during which an application under O. 21, r. 90 for setting aside the sale is pending will be deducted, as the sale will be deemed to be absolute when such application was disallowed (43 Mad. 185), but the period of pendency of a suit filed by the judgment-debtor to set aside the sale, after the dismissal of the application under O. 21, r. 90, cannot be deducted—*Sorman v. Thiruvazhiperumal*, 51 M.L.J. 126, 96 I.C. 657, A.I.R. 1926 Mad. 857.

181.—Applications for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908. Three years. When the right to apply accrues.

This Article corresponds to Art. 178 of Act XV of 1877.

691. Scope of the Article :—The operation of this Article is limited to applications made under the *Civil Procedure Code*. Since all the other applications in this division are applications under the Code, it is natural to conclude that the applications referred to in this Article are applications *eiusdem generis* i.e., applications under the C. P. Code—*Bal Manekbai v. Manekji*, 7 Bom. 213 (214); *Wadia v. Purshotam*, 32

Bom. 1; *Madhab Mani v. Lambert*, 37 Cal. 796; *Empress v. Ajudhia Singh*, 10 All. 350; *Gnanamuthu v. Vana*, 17 Mad. 379 (381); *Ranbir v. Drigpal*, 16 All. 23; *Tiluck Singh v. Parsotam*, 22 Cal. 924; *Rahmat Karim v. Abdul*, 34 Cal. 672 (674); *In re Ishan Chunder*, 6 Cal. 707 (708); *Jagdip v. Holloway*, 2 P.L.J. 206 (208), 39 I.C. 653.

Therefore, this Article does not apply to applications for probate, letters of administration or succession certificate (though of course long and unexplained delay may throw doubt on the genuineness of the will)—*In re Ishan Chandra*, 6 Cal. 707 (709); *Gnanamuthu v. Vana Koilpillai*, 17 Mad. 379 (381); *Bai Manekbai v. Manekji*, 7 Bom. 213 (214); *Kashl v. Gopi*, 10 Cal. 48; *Janaki v. Keshavalu*, 8 Mad. 207; or to an application under the Religious Endowment Act—*Janaki v. Kesavalu*, 8 Mad. 207. It has no application to proceedings taken under the Bhagdari Act (Bombay Act V of 1862)—*Collector v. Desai*, 7 Bom. 546 (551). It does not apply to an application made under sec. 214 of the Indian Companies Act, 1882—*Connel v. Himalayan Bank*, 18 All. 12 (15). It does not apply to applications for enforcement of costs by a solicitor against his client by the summary method provided by the Rules of the High Court—*Wadia v. Purshotam*, 32 Bom. 1; *Narendra Lal v. Tarubala*, 48 Cal. 817, 25 C.W.N. 800, 66 I.C. 209; *Lakhimoni v. Dwijendra*, 46 Cal. 249 (253), 23 C.W.N. 473. It does not apply to an application under the Provincial Insolvency Act by a creditor of an insolvent to be entered in the schedule of creditors because that Act is intended to be a complete code in itself and to prescribe its own period of limitation; and as the Prov. Insolvency Act prescribes no period of limitation for such applications, it follows that such applications are not barred by any rule of limitation, and the matter is left to the discretion of the Insolvency Court—*Jhan Bahadur v. Bailiff*, 5 Rang. 384, A.I.R. 1927 Rang. 263 (264), 104 I.C. 816. It cannot apply to proceedings to set aside a fraudulent transfer under sec. 36, Provincial Insolvency Act—*Daryal v. Kunj Lal*, A.I.R. 1926 Lah. 553; or to an application made by a Receiver under sec. 36 of the Provincial Insolvency Act, 1907—*Duraiya v. Venkatarama*, 12 L.W. 535, 60 I.C. 123. (But see *Mir Afzal v. Mir Aman*, 107 P.L.R. 1014, 23 I.C. 397 and *Nikka Mal v. Marwar Bank*, 151 P.R. 1010, 52 I.C. 188). The Rangoon High Court is of opinion that this Article is not restricted to applications under the Civil Procedure Code. If the third division of the Schedule was intended by the legislature to apply only to applications under the Code, then the express reference in certain articles in this division to applications under the Code and the omission of such reference in other Articles seem to be inexplicable—*Jhan Bahadur v. Bailiff*, 5 Rang. 384, 104 I.C. 816, A.I.R. 1927 Rang. 263 (264). And so in a recent case this Article has been applied to an application under sec. 8 (1) of the Presidency Towns Insolvency Act for the review of a judgment passed by the High Court in its Insolvency jurisdiction—*In re L. W. Nasse*, 7 Rang. 201, A.I.R. 1929 Rang. 229 (232), 118 I.C. 615. According to the Lahore High Court also this Article is not restricted to applications under the C. P. Code but refers to all applications for the making of which the Civil Procedure Code gives authority. Thus, an application to set aside an

ex parte order passed under sec 150 of the Indian Companies Act (1882), is an application under O. 9, r. 13 of the C. P. Code (read with sec. 141 of that Code), and is therefore an application governed by Article 181 of the Limitation Act—*Hindusthan Bank v. Mehraj*, 1 Lah. 187 (191), 55 I.C. 820. So also, in some cases, Article 181 has been applied to an application to set aside a sale under sec. 173 of the Bengal Tenancy Act, as such application is not provided for by any other Article of the Limitation Act, or by Sch. III of the B. T. Act—*Chand Monee v. Santo Monee*, 24 Cal. 707, (709, 710); *Chandrama v. Maharaja of Dumraon*, 38 I.C. 209 (Pat.); *Ananta Charan v. Nimai*, 6 Pat 366, A.I.R. 1927 Pat. 177, 101 I.C. 564.

This Article is restricted to applications made to a Court asking it to exercise powers, which unless moved by such applications, it is not bound to exercise *suo motu*. It does not apply where a Court is asked to do an act which it is bound to do and has no discretion to refuse to do. Thus, a Court is bound of its own motion to bring a decree into conformity with its judgment, under sec 206 C. P. Code 1882 (O 20, r 6); no application is necessary for that purpose; even if an application is made, it is not subject to the rule of limitation under this Article—*Darbo v. Kesho*, 9 All. 364, 365 (dissenting from *Gaya Prasad v. Sikri Prasad*, 4 All 23); *Kalu v. Latu*, 21 Cal. 259, *Shivappa v. Sivpanch*, 11 Bom 284; *Dhan Singh v. Basant*, 8 All 519. So also, where an order for partition has been made in a suit, it is the duty of the Court to effect the partition, and no application need be made by the plaintiff for the purpose of effecting a partition. Even if an application is made, Article 181 does not apply to it, and such application is not barred by reason of the fact that it is made more than three years after a previous application. Article 182 also cannot apply, as it is a proceeding in the suit itself and not a proceeding in execution, no final decree having been made in the suit—*Dwarka Nath v. Barindra*, 22 Cal 425 (434). An application by the mortgagor for payment of money under O. 34, r 8 is not governed by this Article, because no application is at all necessary for the purpose—*Bhawani Prasad v. Ram Kanta*, 28 O.C. 261, 90 I.C. 418, A.I.R. 1925 Oudh 649. The appointment of a Commissioner is a matter which it is competent for a Court to make without being put in motion by any party to the litigation, and therefore an application by a party with reference to such matter is not governed by this Article—*Latchmanan v. Ramanathan*, 28 Mad 127 (129). So also, it does not apply to an application to the Court to perform the functions of a ministerial character; e.g., an application by an auction-purchaser for a certificate of sale—*Vithal Janardan v. Vithojurav*, 6 Bom 586 (587) (dissenting from *Re Khaja Pathanji*, 5 Bom 202); *Devidas v. Pirjada*, 8 Bom. 377 (dissenting from 5 Bom 202 and *Tukaram v. Satvaji*, 5 Bom. 206); *Kylasa v. Ramasami*, 4 Mad. 172; it does not apply to an application made in a pending case, e.g., an application to revive a suit in which no final order has been made—*Ram Nath v. Umacharan*, 3 C.W.N. 750, *Surendra v. Khetter*, 30 Cal. 609; *Kedarnath v. Hara Chand*, 8 Cal. 420; *Madhab Moni v. Lambert*, 37 Cal. 796 (806); or to an application to revive a

suit and restore it to the board, or to transfer a case from one board to another or to transfer a case to the bottom of the board and so forth—*Govind Chunder v. Rungunmony*, 6 Cal. 60 (64). This Article does not apply to an application asking the Court to pass judgment on an award filed to Court, because it is an act which the Court is bound to do—*Iswardas v. Dosibai*, 7 Bom. 316 (322); or to an application to bring the attached property to sale—*Phiraya v. Adu Ram*, 179 P.R. 1882.

An application falling under sec. 47 C. P. Code is governed by this Article—*Abdul Kadir v. Ambika*, 97 I.C. 697, A.I.R. 1927 Cal. 57; *Umapati v. Sheikh Soleman*, 54 Cal. 419, 103 I.C. 233, A.I.R. 1927 Cal. 614. Thus the title of a purchaser at a sale in execution of a mortgage-decree (e.g., the question whether certain lands were or were not included in a mortgage-decree for sale) should be determined by an application under sec. 47 C. P. Code; such an application falls under Article 181, and the right to apply accrues at the date of sale—*Umapati v. Sheikh Soleman* (supra).

Certification of payment:—The word “application” in this Article means an application *cjusdem generis* with the applications mentioned in the previous Articles; that is, an application on which the Court has to perform a judicial act or to decide some point judicially. A certificate by a decree-holder of any payment out of Court, under O 21, r. 2 (1), C. P. Code does not raise any point on which the Court has to decide judicially, and is not therefore an application under Article 181. There is no limitation which compels the decree-holder to certify a payment or adjustment under the provisions of O. 21, r. 2 (1) within any particular time—*Prakash Singh v. Allahabad Bank*, 1 Luck. 428, 29 O.C. 358, 98 I.C. 353, A.I.R. 1927 Oudh 7; *Eusufzeman v. Sanchia*, 43 Cal. 207 (210); *Haji Abdul Rahman v. Khoja Khaki*, 11 Bom. 6 (34); *Tukaram v. Babaji*, 21 Bom. 122 (124); *Jatindra v. Gagan*, 46 Cal. 22 (24); *Jalim Chand v. Yusufali*, 54 Cal. 143, A.I.R. 1925 Cal. 1012, 86 I.C. 1051; *Sheikh Ilahi v. Nawab Lal*, 4 P.L.J. 159 (161), 50 I.C. 364; *Balai Mahomed v. Aijamal*, 26 C.W.N. 529, 68 I.C. 780, A.I.R. 1922 Cal. 30. A certificate of payment given by the decree-holder to the Court is a mere intimation to it that he has received a certain sum of money from the judgment-debtor. It is not an application, because the decree-holder has not to make any prayer to the Court that the payment should be recorded, but only gives an intimation, and on receiving the intimation the Court records the payment. The certificate of payment is not governed by any rule of limitation, and the decree-holder is not bound to certify any payment before his decree is barred—*Joti Prasad v. Srichand*, 51 All. 237 (F.B.), 26 A.L.J. 960, A.I.R. 1928 All. 629 (635). A certification of payment is not an application within the meaning of this Article, even though it is in the form of a petition and is headed as an “application under O 21, r. 2, C. P. Code.” The terms of O. 21, r. 2 do not provide for any application being made by the decree-holder. The Limitation Act does not prescribe any time within which the decree-holder is to certify a payment made out of Court by the judgment-debtor—

Shri Prakash v. Allahabad Bank, 3 Luck. 684 (P.C.), 6 O.W.N. 29, 27 A.L.J. 33, 31 Bom. L.R. 289, 33 C.W.N. 267 (274), 56 M.L.J. 233, A.I.R. 1929 P.C. 19, 114, 581. But the certification must take place within such time as is required to save the case from being barred by limitation. The decree-holder cannot postpone the certification for a long period of years and then say that he will save the decree from being barred by certifying the payments then. That is, the certification must take place within three years before execution is applied for, to save the decree from limitation under sec 20—*Jalim Chand v. Yusufali* (supra); *Bahuballabh v. Jogesh*, 23 C.W.N. 320 (321), 50 I.C. 242.

692. Applications in mortgage suits :—*Application for final foreclosure-decree :—*An application for a final decree in a foreclosure suit under sec. 87 of the Transfer of Property Act (O 34, rule 3 of the C. P. Code of 1908) is governed by this Article, and time runs from the date fixed in the preliminary decree under section 86 for the payment of the mortgage-money. Article 182 cannot apply, because the various clauses in the 3rd column of that Article are inapplicable to the present application. The only clause which can apply, if at all, is clause 1, but the decree or order referred to in that clause is a decree executable on the date it is passed, whereas the preliminary decree in a foreclosure-suit is not executable on the date on which it is passed but only on the expiry of the date fixed therein for the payment of the mortgage-money. Consequently Article 182 is inapplicable—*Ali Ahmed v. Naziron*, 24 All 542 (545, 546), *Balaram v. Kanhai*, 1 P.L.J. 364 (366), 38 I.C. 385; *Rajkumar v. Kedar Nath*, 1 Pat. 435, A.I.R. 1922 Pat. 201, 66 I.C. 97. But in *Parmeshri v. Mohan Lal*, 20 All 357 such an application was held to be an application for execution of the preliminary decree for foreclosure and therefore governed by Article 182. In *Sham Sundar v. Md. Ihtisham*, 27 All 501 (505), it was not decided whether Article 181 or 182 was applicable, but Stanley C.J. expressed the opinion that an application for a final decree for foreclosure was an application for execution of the decree nisi.

The Calcutta High Court is of opinion that an application for a final decree for foreclosure is not governed by this Article (nor by any other Article), because it is an application made in a pending suit, i.e., it is an application to terminate a pending proceeding, and is in effect an application to the Court to do an act which the Court is bound to do. Consequently no question of limitation arises—*Madhabmoni v. Lambert*, 37 Cal 796 (806, 807). Even if this Article applies, the right to apply may be deemed to accrue from day to day (as it is made in a pending suit)—*Ibid* (following 30 Cal 609 and 8 Cal. 420).

Where the High Court on appeal modifying the decree of the lower Court for sale passed a preliminary decree for foreclosure, the period of limitation for a final decree for foreclosure ran from the date of the appellate decree of the High Court (or rather the date fixed in that decree for payment of the mortgage-money), if the other party preferred an appeal to the Privy Council, and that appeal was dismissed for default

of prosecution, the decree-holder would not be entitled to compute the period of limitation from the date of the order of the Privy Council dismissing the appeal for default—*Rajkumar v. Kedar Nath*, 1 Pat. 435 (441), 3 P.L.T. 565, A.I.R. 1922 Pat. 201, 66 I.C. 97. The plaintiff sued for foreclosure of a mortgage which purported to comprise five villages, but he obtained a preliminary decree in 1899 in respect of three villages only. He appealed against the dismissal of his suit as regards the other two villages, and this appeal was dismissed by the High Court in 1902. In 1903 he applied for a final decree for foreclosure. *Held* that this application was not barred by limitation, because time ran not from the date fixed in the preliminary decree for payment of the mortgage money but from the date of the decree of the High Court, because it was not until that date that there was any final decision as to the property to be foreclosed—*Shri Sundar v. Md. Jhishari*, 27 All. 501 (509). Where after the plaintiff applied for a final foreclosure decree, the day fixed in the preliminary decree for payment of the mortgage money was postponed at the defendant's request, the postponement did not amount to a dismissal of the application of the plaintiff to have a final decree passed. The application must be deemed to have remained *pending* for final orders, and the Court must be deemed to have postponed the passing of the final orders. No further application for a final decree is necessary; and any subsequent application if made in that behalf is only for the continuation of the proceeding on the original application which has been suspended. Such an application, being an application made in a *pending* case, is not governed by Article 181 or by any rule of limitation—*Chinnaji*

of the T. P. Act were merely in continuation of the original suit, therefore the application under sec 89 was not subject to any limitation. Art. 181 did not apply because that Article was limited to application under the C. P. Code, and that Article 182 also did not apply to the proceeding under sec 89 of the T. P. Act was not one in the nature of a decree. In *Rungiah v. Nanjappa*, 26 Mad. 780 (789) the decision was held to be governed by Article 181 and not by Article 182.

After sections 85-90 have been incorporated into the C. P. Code, it has been held that an application for final decree for sale in mortgage-suit (under sec 5) being an application under the C. P. Code, falls under this Code; and Article 182 cannot apply because strictly speaking the application is not one for execution of the preliminary decree (but is an application to obtain a further decree)—*Ahmed Khan v. Gaura*, 40 All. 203 (205); *Beni Singh v. Nandoo Singh*, 19 C.W.N. 473, 28 I.C. 211; *Bala Ram v. Kanhai*, J. 364 (366), 38 I.C. 385, *Madho Ram v. Nihal Singh*, 38 All. 21, *Atmaram v. Sankar*, 38 Bom. 32; *Venkayya v. Sathiraju*, 44 Mad. 715; *Kuppall Chetty v. Krishnammal*, 14 M.L.T. 194, 16 I.C. 799, *Mani v. Karan*, 39 All. 532; *Gajadhar v. Kishan*, 39 All. 641, *Maqbul Heshri*, 27 A.L.J. 976, A.I.R. 1929 All. 677 (679), 118 I.C. 670; *Mani v. Gajanan*, 25 Bom. L.R. 459, A.I.R. 1923 Bom. 420, 73 I.C. 211. Time begins to run after the expiry of the period fixed by the preliminary decree for payment of money (if there is no appeal from the preliminary decree)—*Ahmed v. Gaura*, 40 All. 235 (237), *Raj Behari Prasad v. Nanjappa*, 4 P.L.J. 523 (524), 50 I.C. 544, *Nanheal v. Gulshan*, 18 All. 58, A.I.R. 1922 Nag. 217, 68 I.C. 919. If there is an appeal from the preliminary decree, time runs from the date of the appellate decree or of the decree in second appeal as the case may be (even though the appellate Court confirms the decree of the lower Court), but not from the date fixed in the preliminary decree of the Court of first instance—*James v. Bank of Upper India*, 8 Lah. 253 (P.C.), 31 C.W.N. 444, A.L.J. 666, 25 A.L.J. 78, 29 Bom. L.R. 782, 100 I.C. 22, A.I.R. 1927 Cal. 25; *Sayid Jawad Hossain v. Genda Singh*, 6 Pat. 24 (P.C.), 7 P.L.T. 31, C.W.N. 58, 44 C.L.J. 63, 51 M.L.J. 781, A.I.R. 1926 P.C. 93. (Following 38 All. 21 on this point), *Nimmala v. Seetharamiah*, 32 M.L.J. 41 I.C. 268, *Mahabir v. Kanhaiya Lal*, 21 A.L.J. 526, A.I.R. 1924 Cal. 19, 74 I.C. 372; *Gajadhar Singh v. Kishan Jiwan Lal*, 39 All. 641, *Nizamuddin v. Bohra Bhim Sen*, 40 All. 203, *Tula Ram v. Bhup*, 47 All. 913, 89 I.C. 214, A.I.R. 1925 All. 691, *Uma Charan Chakrabarti*, 37 C.L.J. 452, A.I.R. 1923 Cal. 389, 75 I.C. 2, *Sayyid Hussain v. Genda Singh*, 1 Pat. 444, A.I.R. 1922 Pat. 205, 66 I.C. 211, *Venkayya v. Sathiraju*, 44 Mad. 714 (717); *Fitzholmes v. Bank of Upper India*, 5 Lah. 257 (259), A.I.R. 1924 Lah. 582, 81 I.C. 649, *Mani v. Jot*, 21 O.C. 176, 47 I.C. 206; *Subbarajulu v. Sundararajulu*, A.L.J. 507, 48 I.C. 185, but not from the date of the order of the Council dismissing the Privy Council appeal for default of prosecution—*Abdul Majid v. Jawahir*, 36 All. 350 (P.C.); *Sachindra v. Maharaj*

Bahadur, 49 Cal. 203 (P.C.), 48 I.A. 335, 26 C.W.N. 858, A.I.R. 1922 P.C. 187, 74 I.C. 660.

The fact that there was a clerical error in the decree in the statement of the amount due would not entitle the decree-holder to count limitation from the date on which the error was corrected, as the correction of the error did not make any alteration in the decree, and the decree as corrected could not be said to be a new decree—*Ram Chandra v. Jai Mal*, 20 A.L.J. 640, A.I.R. 1923 All 22, 69 I.C. 199

Where the preliminary mortgage-decree was passed against separate sets of defendants for separate amounts decreed against them, and some of them appealed while others did not, held that the period of limitation for an application for a final decree for sale against the non-appealing defendants began to run from the expiry of the date fixed in the preliminary decree for payment of the amount, and not from the date of the decree in appeal, because the appeal was not an appeal against the whole decree but was limited to that part of the decree which affected the appealing defendants only—*Gyan Singh v. Ata Husein*, 43 All. 320 (323, 324) Where the preliminary decree for sale was passed against all the members of the family, and some of the members only appealed but the appeal was preferred in the interests of and on behalf of the whole family, the period of limitation for an application for a final decree for sale would run from the date of the appellate decree—*Tula Ram v. Bhup Singh*, 23 A.L.J. 867, A.I.R. 1925 All 691, 89 I.C. 214.

Where the preliminary decree was passed in 1897 and the decree-holder after making several applications in 1898, 1901, 1904 and 1907, made a final application for a final decree for sale in 1909 when the new C. P. Code was passed, it was held that the right to apply accrued when the new C. P. Code conferred the right in 1909, and the application was therefore not barred. Prior to the passing of the C. P. Code of 1908, the application which the mortgagee-decreeholder had to make was an application under sec. 89 T. P. Act, viz. an application for an order absolute for sale; i.e., the right which the decreeholder possessed was a right to enforce his judgment not by means of an application for a decree final, but by means of an application for an order absolute, and to this application Article 179 was held to apply; it was the C. P. Code of 1908 that for the first time conferred on the mortgagee-decreeholder the right to apply for a final decree for sale, and hence the right to apply for the final decree accrued on the day on which the new C. P. Code came into operation, viz. 1st January 1909—*Narsingrao v. Bandu*, 42 Bom. 309 (319, 320), 20 Bom.L.R. 481, 46 I.C. 107

Application under O. 34, rule 6—An application for a supplementary decree under sec. 90 of the T. P. Act (O. 34, r. 6 of the C. P. Code of 1908), though an application in an execution proceeding, is not an application for the execution of a decree or order; Article 182 is inapplicable, and the application is governed by Article 181—*Md. Illijat v. Alimunnissa*, 40 All. 551, 47 I.C. 502; *Ram Suraj v. Ghuranl*, 21 All. 453; *Gajadhar v. Alliance Bank of Simla*, 28 All. 660 (663); *Venkatasubba v. Shanmugam*.

1913 M.W.N. 867, 21 I.C. 530; *Chunni Lal v. Tikomdas*, 13 N.L.R. 76, 39 I.C. 854.

In *Rahmat Karim v. Abdul Karim*, 34 Cal. 672 (674), Article 181 was held inapplicable to an application under sec. 90 T. P. Act because that Article is limited to applications under C. P. Code and does not apply to applications under the T. P. Act. But now that sec. 90 of the T. P. Act has been incorporated into the C. P. Code, the ruling in 34 Cal. 672 is no longer good law. In *Bishwambhar v. Ramsundar*, 42 Cal. 294 (299) Art 181 was held to be inapplicable even to an application under O. 34, r. 6 of the C. P. Code. In a recent Full Bench case (overruling the above two cases) the Calcutta High Court has laid down that an application under O. 34, r. 6 is governed by Article 181—*Pell v. Gregory*, 52 Cal. 828 (F B.), 29 C.W.N. 678, A I R 1925 Cal 834, 89 I C 1

As regards the time when the right to make such application accrues, the High Courts are not unanimous. In some cases it has been held that the right to apply accrues after the sale, when it is found that the sale proceeds are insufficient to satisfy the debt—*Gajadhar v. Alliance Bank*, 28 All 660 (664); *Ma Ilfat v. Almunissa*, 40 All 551 (552); *Raj Narain v. Santi Lal*, 21 A.L.J. 37, 79 I C 85, A I R 1923 All. 203. In several other cases, however, it has been held that it is not necessary that the applicant should make his application within 3 years of the date of the confirmation of the mortgage-sale. It is the date of the suit and not the date of the application which must be looked to, if he had his personal remedy at the date of the institution of the suit on the mortgage i.e., if the suit on the mortgage had been brought within 6 years from the due date of the mortgage (Art 116), the application for personal decree is not barred, though made more than 3 years after the date of sale. When an application is made under sec 90 of the T P Act, the Court has to consider, if any question of limitation arises, whether the personal remedy was barred at the date of the institution of the suit, and not whether it would be barred at the date of the application under sec 90—*Rahmat Karim v. Abdul Karim* 34 Cal. 672 (675), following *Purna Chandra v. Radha Nath*, 33 Cal 867 (873), *Hamid-ud-din v. Kedar Nath*, 20 All. 386; *Chattar Mal v. Thakuri*, 20 All 512, *Jang Singh v. Chander Mal*, 30 All 388, *Gulam Hussein v. Mahamadali*, 34 Bom 540 (545), *Peria Tiruvadu v. Muthammel*, 2 L W 66, 27 I C 770 (771); see also *Bishambhar v. Ram Sundar* 42 Cal 294 (297)

Where after the sale of the mortgaged property in execution of the mortgage-decree, the sale is set aside and the mortgagee is required to refund the proceeds to the purchaser, he can apply under O 34, r. 6, and the time for making such application runs from the date on which he refunded the purchase money to the purchaser (and not when the decree for setting aside the sale was passed)—*Badal Sing v. Debi Saran*, 49 All 506, 101 I.C. 775, A I R 1927 All 395

Application under O. 34, r. 8:—Where a preliminary decree for redemption is passed, but the mortgagor fails to pay the decretal amount on or before the fixed date, the Court may extend the time under O. 34, r. 8, proviso (now O 34, r. 7 (2)), and the mortgagor is entitled to pay

into Court within the extended time and apply for a final decree. The application for a final decree for redemption is governed by this Article, and the period of limitation runs from the date on which the mortgagor pays the money—*Moru v. Gangabai*, 50 Bom. 730, 98 I.C. 943, A.I.R. 1927 Bom. 32.

If a preliminary decree for redemption is passed by the lower Appellate Court, against which a second appeal is preferred to the High Court, which eventually dismisses the appeal, the period of limitation for an application for a final decree for redemption runs from the date of the decision of the High Court and not of the lower Appellate Court. The decision of the High Court is a decision after hearing the merits of the case, and supersedes the decree of the lower Appellate Court—*Venkatarama v. Doddachariar*, 58 M.L.J. 207, A.I.R. 1930 Mad. 353 (354), 125 I.C. 95. The fact that the second appeal was dismissed by the High Court on the ground that there was no question of law does not make the decision of the High Court any the less a decision on the merits. But the matter would have been different if the High Court had dismissed the appeal summarily as time barred or for default of appearance or want of prosecution or some similar reason. In such a case the period of limitation would have run from the date of the decree of the lower Appellate Court—*Ibid.*

693. Application for execution:—Application for execution are generally governed by Article 182, and the period of limitation runs from the various points of time enumerated in the several clauses of the 3rd column of that Article. But sometimes it may happen that the various points of time enumerated therein will not apply to a particular application; in such a case, the application will fall under Article 181. Article 182 is not exhaustive of applications for execution of decrees, and Article 181 may sometimes be applied to such an application. The law has been thus stated: "The true criterion in determining whether Article 181 or 182 applies to a particular application is to ascertain whether any one of the several points of time specified in col. 3 of Art. 182 is applicable to it; and if none of them is applicable, it is only then that Art. 181 will apply." In this case the decree (passed under sec. 88, Transfer of Property Act) directed the sale of the mortgaged property in default of payment of the mortgage-money on or before a date fixed in the decree. On default of payment the decree-holder applied for execution of the decree. It was held that Article 182 could not apply, because none of the points of time enumerated in the various clauses of that Article was applicable to the application; thus, clause 1 did not apply, because the decree was not executable on the date of the decree but only at some future time if default was made; clause 7 also did not apply, because the decree as such did not direct the payment of any money on a particular date, but directed the sale of the property if a particular sum was not paid by a given time. Consequently Article 181 was the proper Article applicable to the case—*Rungiah Goundan v. Nanjappa*, 26 Mad. 780 (789). Where a foreclosure-decree provides that it should not be executed till the expiry of a certain period, none of the clauses of

Art. 182 applies to an application for execution of such decree. Consequently, Art. 181 applies, and time runs from after the expiry of such period—*Thakur Das v. Shadi Lal*, 8 All. 56 (57). A decree for possession of a property was passed subject to the condition that if the judgment-debtor paid to the decreeholder year by year so long as he might live an allowance of Rs. 200 per year for his maintenance the decree for possession would not be executed, but if the judgment-debtor made default in payment of any year's allowance, the decree-holder would be entitled to delivery of possession of the property in execution of that decree. A default having occurred, the decree-holder applied for possession under the above decree. *Held* that Article 182 could not apply; for it was quite clear that clause 7 of that Article was inapplicable, since the application was for possession and not to enforce a payment of money; and that the other clauses of Article 182 were inapplicable. Consequently Article 181 governed the application—*Muhammad Islam v. Muhammad Khan*, 16 All. 237 (239). In this case it was further held (at p. 238) that the decree-holder was not bound to execute his decree upon the occurrence of the first default, but might execute it on occasion of a subsequent default, thus, in this case, a default took place in 1878, and then another in October 1889, and the decreeholder applied in March 1892, it was held that the application was not barred, as time ran from October 1889 and not necessarily from 1878.

Decree not in existence —The Limitation Act, in so far as it applies to execution, requires that there must be some decree in existence which can be executed. An execution application was filed on 1st September 1921; on the 16th September 1921 a suit was filed to set aside the decree and the next day an injunction was granted restraining the decree-holder from executing the decree. The injunction expired on 26th August 1922, but meanwhile the decree had been set aside, and it was only on 6th April 1925 that the order setting aside the decree was reversed, and an execution application was filed on 26th June 1925. *Held* that the application was not barred, because from the 17th September 1921 to the 6th April 1925 the decreeholder was either restrained by an injunction from executing the decree or there was no decree whatever to execute—*Ram Ghulam v. Raj Kumar*, 6 Pat. 635, 102 I.C. 327, A.I.R. 1928 Pat. 86.

Decree incapable of immediate execution —A decree which was passed in 1894 directed that the plaintiff would be entitled to get possession upon payment of Rs. 750 to the defendant in any year in the month of Jeth. The money was deposited in 1915 and the application for execution was made in 1916. It was held that the application was governed by Art. 181, and not by Art. 182. The latter Article applies to cases in which a decree is capable of execution on the date on which it is passed, except in circumstances mentioned in some of the special clauses to that Article. The decree in this case being indefinite as to the date on which the payment of Rs. 750 was to be made, was not capable of execution on the date on which it was passed. Therefore Art. 181 applied and not Art. 182, and the right to apply for execution accrued when the payment

was made in 1915; the application was therefore not barred—*Rukmina v. Sheo Dat*, 17 A.L.J. 841, 51 I.C. 576

In a suit against E and J of whom J died *pendente lite* a decree was passed in 1906 which did not provide that E should be personally liable but declared that the decretal amount should be realised by the sale of the property of J in E's possession. E for the first time obtained possession of J's property in 1914, and the decree-holder applied in the same year to execute the decree. *Held* that the application was not barred by limitation; that Art. 182 did not apply, in as much as the decree was not capable of immediate execution in 1906; that the application for execution could not be made till E got possession of J's property; and that the Article applicable was Article 181, and the right to apply accrued in 1914 when E obtained possession of J's property—*Maharaja of Darbhanga v. Homeshwar Singh*, 6 P.L.J. 132 (139) (P.C.), 25 C.W.N. 337, 40 M.L.J. 1, 19 A.L.J. 26, 59 I.C. 636, 1 P.L.T. 731, 59 I.C. 636, A.I.R. 1921 P.C. 31

A pre-emption decree is incapable of execution until the decree-holder pays the pre-emption price into Court, and consequently clause 1 of Article 182 is inapplicable, and no other clause in Article 182 being under the circumstances applicable, the general Article 181 would apply, and the time for an application for execution of their pre-emption decree commences to run when the price is paid—*Chhedt v. Lahu*, 24 All. 300; *Chandika v. Kalu*, 22 O.C. 82, 52 I.C. 156.

Where by mistake of Court, the name of the judgment-debtor has been omitted from the decree, the decree is incapable of execution until it is amended and the name of the judgment-debtor brought on the record; the right to apply (under Article 181) for execution accrues from the date of amendment—*Debi Baksh v. Shambhu Dial*, 48 All. 281, 24 A.L.J. 266, A.I.R. 1926 All. 384, 94 I.C. 877 (following 17 All. 39).

Where a decree is not executable at once as regards certain matters but leaves them to be subsequently ascertained, the period of limitation would run (under this Article) from the date when they are ascertained, as the decree becomes capable of execution as regards those matters only then—*Ratnachalam v. Venkatrama*, 29 Mad. 46 (47). When a decree is one for payment of a certain sum of money composed of three items, one of which has to be ascertained, limitation for execution of the whole decree runs (under this Article) from the date of ascertainment of the unspecified sum—*Vijayanatha v. Subramania*, 36 Mad. 104 (107).

Where a money decree was by its terms not capable of execution till after the expiry of six months from the date of the decree, because the judgment-debtor had been allowed the option of paying the decretal money without interest within that period, *held* that Article 181 applied, and the period of limitation ran after default was made in the payment of the money, *i.e.* after the expiry of six months from the date of the decree—*Surefman v. Anjori Shukul*, 46 All. 73 (74), A.I.R. 1924 All. 263, 79 I.C. 605, 21 A.L.J. 861, following *Maharaja of Darbhanga v. Homeshwar*, 6 P.L.J. 132 (P.C.). Where a decree dated July 1882 directs the plaintiff to deliver certain lands to the defendant in January 1883, before he can

recover certain lands from the defendant, limitation runs from January 1883 and not from July 1882—*Narayan v. Vitthal*, 12 Bom. 23 (25). Where a decree for redemption provided that the plaintiff would be put into possession upon payment by him to the defendant of the mortgage-amount and the value of the improvements to be determined in execution, the decree became a complete decree on the date when the Court determined the value of improvements, and limitation (Art. 181) ran from that date—*Krishnan v. Nilakandan*, 8 Mad 137 (139).

Decree for perpetual injunction.—When a decree for perpetual injunction has been granted, the decree may be enforced on each successive breach of it. An application for execution of the decree falls under this Article and must be made within three years of the date of the particular breach which is the occasion for the application. But the decreeholder is not bound to take action in case of every petty infringement; and the fact that he does not enforce his rights on a petty breach will not deprive him of the fruits of his decree if a serious infringement were afterwards made—*Venkatachellan v. Veerappa*, 29 Mad 314 (317). See also *Ram Saran v. Chatar Singh*, 23 All. 465 (466), where it is held that Article 182 is inapplicable to an application to enforce an injunction upon its disobedience. It was held in *Sadagopachari v. Krishnamachari*, 12 Mad. 356 (364), and *Goswami Gordhan v. Goswami Makandan*, 40 All. 648 (651) that an application for execution of a decree for injunction was to be brought within 3 years of the date of the breach of the injunction, but no Article was mentioned in the judgments.

694. Revival or continuation of previous application for execution.—A distinction should be made between a new application for execution of a decree and an application which amounts to a *revival* or *continuation* of a previous one. And it is now an established rule of law that if the application is to initiate a new execution, it would be governed by Art 182, and not by Art 181; but if it is intended merely to *revive* or carry through a pending execution, it would fall under Art. 181 and not Art 182—*Subha Chariar v. Muthu Veeran*, 36 Mad. 553 (556), *Chalavadi v. Poloori*, 31 Mad 71 (75); *Raghubans v. Sheo Saran*, 5 All 243 (245), *Akshay v. Abdul Kader*, 57 Cal. 860, 34 C.W.N. 102 (105).

Whether a subsequent application is to be treated as a new application or as a *continuation* of a prior application is a question of fact to be decided with reference to the circumstances of the case. It is really a question of fact, a question of the intention of the decree-holder as to what he wants, it is not a question of pure law. In deciding this question, the substance of the application will have to be looked to, and not the form of it—*Chhattar Singh v. Kamal Singh*, 49 All 276 (F.B.), A.I.R. 1927 All 16, 25 A.L.J. 201, 100 I.C. 692.

The principle is, that where the proceedings in respect of an application for execution have been interrupted by the intervention of objections and claims subsequently proved to be groundless, or have been suspended by reason of an injunction or like obstruction, a subsequent application for execution, *similar in scope and character*, may be treated as in

19 L.W. 613, A.I.R. 1924 Mad. 178, 76 I.C. 126; *Pattanayya v. Pattayya*, 50 M.L.J. 215, A.I.R. 1926 Mad. 453, 92 I.C. 782.

The mere fact that an execution-application is *struck off* does not by itself indicate the final determination of the execution proceedings—*Manorath v. Ambika*, 13 C.W.N. 533 (540), 1 I.C. 57, 9 C.L.J. 443. An order made by a Judge upon an application which is still pending, that it be 'struck off' or 'sent to the record room' made either without notice to the decree-holder or without giving him an opportunity of being heard, is a ministerial order, and cannot be regarded as a judicial disposal of the application on the merits (per Walsh J.) An order striking off a pending application for execution is neither recognised by law nor sanctioned by any rule (Lindsay J.)—*Chattar Singh v. Kamal Singh*, 49 All. 279 (F.B.), 100 I.C. 692, A.I.R. 1927 All. 16. The application must be treated as still pending, and the next application must be regarded as one asking for revival of the execution which has thus been suspended—*Baij Nath v. Ram Bharos*, 49 All. 509 (F.B.), A.I.R. 1927 All. 165, 104 I.C. 116. Where the order of the Court on an execution application is merely an order of striking off and not an order finally disposing of it, a subsequent application for execution must be treated as one to revive and carry through the pending execution-proceeding which was merely suspended, and is not an application to initiate a new execution—*Qamaruddin v. Jawahir*, 27 All. 334 (338) (P.C.). Thus, where the decree-holder applied for execution and it appeared that the judgment-debtor was residing outside the jurisdiction of the Court, and the Court without any application on the part of the decree-holder to transmit the decree to another Court, gave him a week's time to apply for an order of transmission, and, as he did not so apply, struck off the execution application on the 7th day, held that that was not a proper disposal of the application, which should therefore be treated as still pending—*Subramanyan v. Rangiah*, 17 M.L.J. 616.

If an application for the execution of a decree is struck off or suspended for no act or default of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings, and the subsequent application is considered as a revival of the previous one—*Madho Prasad v. Draupadi*, 43 All. 383 (385), *Bhagwanta v. Zamir Ahmed*, 3 Pat. 596, A.I.R. 1924 Pat. 576, 78 I.C. 766; *Akhtar Husain v. Qudrat Ali*, 26 O.C. 206, 80 I.C. 775, A.I.R. 1924 Oudh 31, *Qamaruddin v. Jawahir*, 27 All. 334 (P.C.), *Majibulla v. Umad Bibi*, 30 All. 499 (504), *Ram Lakhan v. Mena Lal*, A.I.R. 1922 All. 433, *Rajani Bandhu v. Kali Prasanna*, 74 I.C. 279, A.I.R. 1924 Cal. 419. And the order of revival is not without jurisdiction, even though it was passed without notice to the judgment-debtor—*Girdarilal v. Ram Charan*, 24 A.L.J. 437, 94 I.C. 613, A.I.R. 1926 All. 331.

Where execution proceedings were stayed at the instance of the judgment-debtor, and the case was struck off the file "for the present" and for the convenience of the Court, a second application for execution was one in continuation of the former proceedings—*Baikantha v. Aghore Nath*, 21

Cal. 387 (391). Where the sale in execution could not take place owing to absence of bidders, and the decree-holder was ordered to pay fees for fresh sale-proclamation, which the decree-holder did not pay, and thereupon the application for execution was struck off "for the present," held that the words "for the present" in the Judge's order showed that the proceedings did not come to an end but were merely kept in abeyance, that the attachment still continued, and that the next application for execution made by the decreeholder would be treated as one for revival of the former proceedings—*Majibulla v. Umad Bibi*, 30 All. 499 (502). It was further held in this case that as the decree-holder was not bound by law to pay the costs of the fresh sale proclamation, the dismissal of the previous application could not be said to be a termination of the proceeding in consequence of the decree-holder's omission to do something which he was bound to do, and therefore the subsequent application could not be treated as a fresh application for execution—*Ibid* (at p. 504). But in a Calcutta case where the original application was dismissed owing to the decreeholder's omission to deposit the costs for service of a fresh sale proclamation, and then nearly three years afterwards he made another application, held that the subsequent application was not a continuation of the previous application, in as much as the decree-holder remained quiescent for a long period, and also because there was a clear break in the continuity of the proceedings by reason of the decree-holder's omission to deposit the costs, and thereby the previous proceedings came to an end—*Dhukhram v. Jogendra*, 5 C.W.N. 347 (349).

If a prior application is dismissed for default of appearance, or default in filing processes, or owing to the decree-holder taking no steps, a second application is a new application, and not a continuation of the first one—*Ahmad Khan v. Gaura*, 40 All. 235 (237); *Langtu v. Baijnath*, 28 All. 389 (390); *Kartik Chandra v. Nilmani*, 20 C.W.N. 686, 32 I.C. 931 (933); *Fateh Bahadur v. Parmeshwar*, 6 Pat. 694, A.I.R. 1928 Pat. 145 (146), 108 I.C. 430. Where the previous execution proceedings had been struck off upon satisfaction being entered on the decree, a second application for execution was not a continuation of the previous application, because the former proceedings had been properly and finally disposed of—*Khairunissa v. Gauri*, 3 All. 484 (487). But where in consequence of a suit being brought by certain persons who objected to the attachment, the application for execution was struck off and the sale of the attached property was postponed, held that the application was merely suspended and a subsequent application by the decree-holder after the termination of the suit was a continuation of the previous application—*Shree Prasad v. Indar*, 30 All. 179 (180).

Where a decree-holder applied for the sale in execution of five villages of his judgment-debtor, and two villages were sold and the decree satisfied, but subsequently at the instance of another the sale was held to be a nullity, whereupon the decree-holder made another application for sale of the remaining three villages, praying that as the sale of the two villages had been declared to be a nullity, the prior application should be proceeded with, and that the three villages which it was not then

necessary to sell by reason of the sale-proceeds of the two other villages being sufficient to satisfy the decree, should now be sold. *Held* that this was in substance an application to take proceedings in continuation of the previous application and was governed by Article 181; and not by Article 182. Time ran from the date when the sale was declared to be a nullity—*Bihari v. Jagannath*, 28 All. 651 (653). An application for execution of a decree was made in 1917, and two properties were sold in 1918; but in 1919 a third person F sued the decree-holder and the judgment-debtor and got the sale set aside in respect of one of the properties, and in 1920 the judgment-debtor got the sale of the other property set aside on the ground of irregularity. The decree-holder again applied in 1921 for execution of his decree. *Held* that by reason of the litigation which took place after the sale, the execution proceedings could be said to have been revived, and the present execution application must be regarded as a continuation of the previous execution proceedings. Art. 181 applied, and time ran from the date on which the sale was set aside either in 1919 or in 1920, and in either case the application was in time—*Radha Kishun v. Kashi Lal*, 2 Pat 829 (832), A I R 1924 Pat 273, 76 I.C. 927, *Issuree v. Abdul Khalek*, 4 Cal. 415.

Where a previous application for execution was dismissed because of a successful application under O. 21, rule 90, a subsequent application for execution is one in continuation of the previous application. But where a previous application was made against *one* only of several judgment-debtors and has been dismissed for that reason, a subsequent application made against *all* the judgment-debtors *cannot* be treated as an application in continuation of the previous application, the previous application being *ab initio* a bad application, the subsequent application is not one made in continuation of it—*Kamal Nain v. Kesho Prasad*, 1 Pat 701 (704), 4 P.L.T. 226, A I R. 1922 Pat 310, 68 I.C. 638.

Where upon application being made for the execution of a decree a property was sold, but the sale was set aside at the instance of the judgment-debtor, a second application for execution by sale of the identical properties is one in continuation of the previous application—*Kaniz Zohra v. Boondi Sahu*, 2 P.L.J. 115 (116), 39 I.C. 89.

When an application for execution is struck off the file, in pursuance of an understanding between the parties to the effect that if negotiations for a compromise should fail the decree-holders should be at liberty to present a fresh application, an application for execution after the failure of such negotiation must be considered as one for the revival of the old execution proceedings—*Venkatrao v. Byesingh*, 10 Bom. 108 (111).

Where an application for execution of a rent-decree was made and the sale took place, but on the application of the judgment-debtor the sale was set aside, and the execution case was dismissed *for default as the decree-holder took no further steps*, it was held that the execution proceeding came to an end, and a subsequent application for execution filed by the decree-holder was *not* a continuation of the previous application as there was no continuity between the two applications—*Madnapore Zemindary Co. v. Diranath*, 22 C.W.N. 766, 45 I.C. 712.

Where the original decree-holder died pending his application for execution, leaving a major and a minor son, and the major son applied to execute the decree as the legal representative of the deceased decree-holder, but he too died pending his application, and the execution application originally preferred by the decree-holder was struck off on the report of the decree-holder's vakil that he had no instructions, and more than three years thereafter the minor son made an application for execution in continuation of the previous execution-application, it was held that as the original application for execution was dismissed as infructuous, the order of dismissal had disposed of the whole matter for the time being, and that the second application was a *fresh* application for execution (and not in continuation of the previous one) and, having been presented more than three years after the disposal of the prior application, was barred—*Rafi Ram v. Naidar*, 41 All 435 (439, 440), 17 A.L.J. 649, 49 I.C. 990.

In order that the subsequent application may be treated as a continuation of the previous one, it is necessary that the second application must be similar in scope and character to the previous one—*Madhabmoni v. Lamberi*, 37 Cal. 796 (804); *Ibrahim v. Sheo Pratap*, A.I.R. 1926 Pat 129, 89 I.C. 886. So, a subsequent application cannot be treated as a revival of the prior application, if the relief claimed in the two applications are entirely different. Thus, where the second application was for *arrest* of the judgment-debtor while the previous application had proceeded against his *property*, it was held that the second application was a *fresh* application and could not be regarded as a continuation of the previous proceeding, as it was perfectly distinct in its nature from the former one—*Virasami v. Athi*, 7 Mad. 595 (597); *Krishnaji Raghunath v. Anandray Ballal*, 7 Bom 293 (296); *Lalumia v. Mazhar*, 95 I.C. 718, A.I.R. 1926 Mad. 698; *Ram Sivendra v. Awadh Behari*, 4 P.L.T. 295, 68 I.C. 629, A.I.R. 1923 Pat. 159; *Har Sarup v. Balgovind*, 18 All. 9 (11). If the second application for execution asks for the attachment of properties *other than those* which were proceeded against in the proceedings instituted by the previous application, the second application is to be treated as a *new* application and not as a continuation of the previous one—*Chalavadi Kotiah v. Poloori*, 31 Mad. 71 (73); *Raghunandan v. Bhugoo*, 17 Cal. 268; *Sreenath v. Yusof*, 7 Cal. 556 (558); *Baikantha v. Aghorenath*, 21 Cal. 387 (391). A landlord decree-holder applied for execution of a rent-decree, when the executing Court held that the execution should proceed as on the basis of a money-decree, and not as a rent-decree. It proceeded in that way, and certain property of the judgment-debtor was sold. The sale was however set aside on the application of the judgment-debtor under O. 21, r. 90, C. P. Code. The decree-holder then applied once more to execute his decree as a rent-decree. Held that the second application should be treated as a continuation of the preceding application, being of the *same character*, in as much as the prayers in both were to execute the decree as rent-decree—*Deo Narayan v. Ram Prasad*, 7 P.L.T. 410, 90 I.C. 799, A.I.R. 1926 Pat. 143.

When execution proceedings were stayed by *injunction* or *prohibitory order*, it was held under the Act of 1877 that a second application for

execution made after the removal of the injunction was to be regarded as an application for revival of the former proceedings under Art. 181 and not as a fresh application under Art. 182, and the period of limitation for this subsequent application would run from the date of removal of the injunction—*Basant Lal v. Batal Bibi*, 6 All. 23; *Amulya v. Preo*, 7 I.C. 886; *Madhab Mani v. Lambert*, 37 Cal. 796; *Ghulam Nashiruddin v. Hardeo*, 34 All. 436 (441); *Sakina v. Ganesh*, 3 P.L.J. 103 (105), 44 I.C. 560; *Bibi Hajo v. Harsahai*, 7 P.L.T. 39, 89 I.C. 992, A.I.R. 1926 Pat. 62; *Kalyanbhai v. Ghanesham*, 5 Bom. 29; *Narayan v. Sono*, 24 Bom. 345; *Chintaman v. Balshastri*, 16 Bom. 294, *Issuree v. Abdul*, 4 Cal. 415; *Lutful v. Shumbhudra*, 8 Cal. 248, *Hurronath v. Chunni*, 4 Cal. 877; *Chandra v. Gopimohan*, 14 Cal. 385 (387), *Ashrafuddin v. Bipin Behari*, 30 Cal. 407 (411); *Gurudeo v. Amrit*, 33 Cal. 689; *Ruddar v. Dhanpal*, 26 All. 156 (159), *Lakshmi v. Ballam*, 17 All. 425 (427), *Rungiah Goundan v. Nanjappa*, 26 Mad. 780 Contra.—*Rajaratnam v. Shivalayammal*, 11 Mad. 103 (105) It should be noted that many of these cases were decided under the Act of 1877, in which section 15 applied only to suits and did not apply to an application for execution of a decree; under the present Act all the cases relating to injunction cited here would fall under Article 182, and the time during which the execution was stayed by the injunction or prohibitory order would be excluded from computation under section 15, which now applies to applications for execution of decrees. See 34 All. 436, at p. 442. But applications for revival of a previous application for execution would be governed by Article 181, as before. This subject has been very fully discussed in the Full Bench case of *Chattar Singh v. Kamal Singh*, 49 All. 276 (F.B.) cited in Note 159 under sec. 15.

Similarly, where the execution of a decree was ordered to be stayed pending an appeal from the decree and the execution proceedings struck off, a subsequent application for execution of the decree after dismissal of the appeal was regarded as one for the revival of such proceedings, and was held to be governed by this Article—*Buti Begam v. Nihal Chand*, 5 All. 459 (461), *Raghubans v. Sheo Saran*, 5 All. 243.

Where an application to execute an *ex parte* decree was struck off the file on the application of the judgment-debtor to set aside the decree, and the decree-holder filed another application after the rejection of the judgment-debtor's application for rehearing of the suit, it was held that the decree-holder's second application for execution was only a continuation of the previous proceedings that had been suspended—*Chandra v. Gopi Mohan*, 14 Cal. 385 (387).

Where the decree-holder is obstructed by violence or fraud, and a litigation is necessary to get rid of such obstruction, the execution is suspended owing to such litigation, and a second application made after the termination of such litigation would be a continuation of the first—*Kartick v. Nilmoni*, 20 C.W.N. 686, 32 I.C. 931 (932).

Where a property attached in execution is released on the claim of a third party against whom the decree-holder has to institute a regular

suit, an application for execution against that property made by the decree-holder after succeeding in the suit is to be regarded not as a fresh application, but as a revival of the previous proceedings and governed by Article 181, and the period of limitation runs from the date of the decree in the claim-suit and not from the date of the previous application—*Paras Ram v. Gardner*, 1 All. 355 (357) (F.B.); *Baboo Pyaroo v. Syad Nazir*, 23 W.R. 183; *Rudra Narain v. Panchu Maiti*, 23 Cal. 437 (440). This principle applies equally to the case of an attachment before judgment. Thus, where certain properties of the defendant in a money suit were attached before judgment, and after a decree was obtained in that suit, a claim petition was put in by a third party and allowed, and the decree-holder consequently filed a suit to establish his right to sell the properties in execution and obtained a decree in his favour, an application by the decree-holder for the sale of the properties attached before judgment was governed by Article 181 and not by Article 182, and the period of limitation ran from the date of the decree in the latter suit, and not from the date of the decree under execution—*Surayya v. Venkataratnam*, 47 Mad. 176 (179, 180), 45 M.L.J. 822, 79 I.C. 779, A.I.R. 1924 Mad. 210.

But where the objector's claim to two-thirds of the attached property having been allowed, the attachment of two thirds of the property was raised and the decree-holder filed a regular suit against the objector, but he was unsuccessful in that suit, and then he made a second application for execution, praying for attachment of the one-third share which was not released from attachment, it was held that as the property sought to be attached and sold in the second application was one which the decree-holder might have proceeded against, notwithstanding the order in the claim proceedings, held that the second application was not a continuation of the previous proceeding for execution—*Raghunandan v. Bhugoo*, 17 Cal. 268 (271).

Where the decree-holder has failed to remove the obstacle (*i.e.* the claim put in by the third party) to his executing the decree, the second application cannot be treated as a revival or legal continuance of the first—*Shivaram v. Sarasvatibai*, 20 Bom. 175 (178); *Khairunnissa v. Gouri Shankar*, 3 All. 484; *Ganpat v. Mehra*, 30 P.R. 1882.

An application for execution by the assignee of a decree was dismissed on the objection of the judgment-debtor that the assignment was for the benefit of the judgment-debtor and that the assignee was therefore not entitled to execute the decree. The assignee thereupon brought a suit to establish her claim that the assignment was for her own benefit, and she obtained a decree declaring that she had obtained a valid assignment and establishing her right to execute the decree. She then applied again to execute the decree. It was held that the second application was one to revive or continue the previous application—*Supra Reddia v. Arudai Arimal*, 29 Mad. 50 (53) (F.B.).

In June 1892, an application was made for execution of a decree and was dismissed, the applicant being relegated to a suit to establish his rights. He did not sue, but in September 1892 he put in a fresh applica-

tion to execute, which was dismissed, as he had not chosen to bring the suit as directed. He then sued, and in March 1895 a decree was passed in his favour. He now put in a petition in October 1895 praying that his petition of September 1892 be revived or continued. It was held that as the last application of September 1892 had not been merely suspended but finally and properly dismissed, the present petition should be treated as a fresh application (and not as a continuation of the first) and therefore barred—*Suryanarayana v Gurunada*, 21 Mad 257 (260)

Within 3 years from the time fixed in a preliminary decree for sale on a mortgage, the decree-holder made an application for a final decree, but the application was returned for a correct statement of the amount due and for a proper description of the mortgaged property. No time was fixed for the amendment, and the decree-holder presented his amended application more than 3 years after the time fixed in the preliminary decree. *Held* that this application was a continuation of the previous application and was not barred—*Kallu Mal v Kashi Nath*, 20 A L J 580, A.I.R. 1922 All 446, 68 I C. 175.

An objection to attachment was made by the judgment-debtor and disallowed. He appealed, and while the appeal was pending, the decree-holder made another application for execution. The Court struck off the application on the ground that it was impossible to proceed with it in the absence of the record which was in the appellate Court. The decree-holder filed a third application within three years after the return of the record from the appellate Court, though more than three years after the previous application. *Held* that this last application was a continuation of the previous application, and time ran when the appeal was disposed of and the records were returned. The application was therefore in time—*Raghubans v. Sheo Saran*, 5 All 243 (244)

694A. Limitation in respect of such application:—Where an application is made to continue proceedings in a *pending* execution, the right to apply accrues from *day to day* and will not be barred until 3 years have elapsed after the proceedings have *ceased to be pending*—*Subba Chariar v Muthuveeran*, 36 Mad 553 (557); *Puttappa v. Puttanayya*, 47 M L J 608, 84 I C. 897, A.I.R. 1925 Mad 152, *Chalavadi v Poloori Alimelammah*, 31 Mad 71 (76), *Pattanaya v Pattaya*, 50 M L J 215, A.I.R. 1926 Mad 453, 92 I C. 782, *Kedar Nath v. Harra Chand*, 8 Cal 420; *Ikkal Narain v Jugran*, 28 O C 158, A.I.R. 1925 Oudh 552, 85 I C 450

Where a sale held in execution of a decree was set aside, and the decree-holder was ordered to refund the purchase money, a second application for execution of the decree was governed by this Article and time ran not from the date on which the sale was set aside but from the date on which the decree-holder was ordered to refund the purchase-money to the purchaser, for till then he had no right to call upon the judgment-debtor to pay his judgment-debt a second time—*Remineedi Venkata v. Lakhoja Chinn*, 30 Mad 209 (212) In execution of a mortgage-decree, the mort-

gaged property was sold and the judgment-debtor purchased it *benami*. The decree-holders made an application in November 1891, to set aside the *benami* purchase and resell the property. The first Court found that the purchase was not *benami* and confirmed the sale in April 1892, but this decision was reversed on appeal in 1893. The decree-holders thereupon made another application for execution and re-sale of the property in December 1894. It was held that this application might be regarded as a continuation of the application of November 1891 for re-sale of the property, and as the decree-holders were precluded by the first Court's finding of 12th April 1892, from asking for sale until it was reversed on appeal in 1893, the application was in time under this Article—*Raghunath v. Lalji*, 23 Cal. 397 (402).

Where the sale held in execution of a decree was set aside at the instance of the judgment-debtor, and then the auction-purchaser filed an appeal against the order setting aside the sale, and the appeal was dismissed and the order setting aside the sale was confirmed, the decree-holder's second application for execution must be filed within three years from the date on which the sale was set aside, and not from the date of the dismissal of the appeal preferred by the auction purchaser. The prior execution proceeding had terminated on the date in which the sale was set aside, and the right to revive the execution proceeding accrued on that date. The general principles of suspension of limitation apply only to those cases where the plaintiff or the decree-holder is prevented from taking action in pursuance of his rights; but in this case the appeal by the auction purchaser (who was a third party) did not prevent the decree-holder from making a fresh application for execution after the sale was set aside. Consequently limitation was not suspended during the appeal—*Akshoy Kumar v. Abdul Kader*, 57 Cal. 860, 34 C.W.N. 102 (105), A.L.R. 1930 Cal. 329, 126 I.C. 268. The words "when the right to apply accrues" mean when the right to apply first accrues—*Ibid*.

If the judgment-debtor prefers an objection to the attachment of the property, the period of limitation in respect of the decree-holder's second application for execution runs as soon as the judgment-debtor's objection is dismissed, whether by the Court of first instance, or on appeal. If the judgment-debtor's objection is allowed by the Court of first instance, but is dismissed on appeal, the right of the decree-holder to apply for a second time accrues from the date of the appellate decree recognizing his right to execute the decree—*Supra Reddiar v. Avudai*, 28 Mad. (50) (53) F.B. If the judgment-debtor's objection is dismissed on appeal, limitation would run from the date of the appellate decree, and the fact that the judgment-debtor has preferred a second appeal to the High Court will not postpone the running of time—*Rudder v. Dhanpal*, 26 All. 156 (159); *Chalavadi Kotiah v. Poloori*, 31 Mad. 71 (73); *Kartick v. Nilmoni*, 20 C.W.N. 64, 32 I.C. 131. If the judgment-debtor's objection is dismissed by the Court of first instance, time runs from the date of the decree of that Court, and the pendency of an appeal by the judgment-debtor from

such decree cannot give the decree-holder a right to defer execution until the disposal of such appeal, because the filing of an appeal by the objector could not operate as a bar to the decree-holder taking out fresh execution—*Ibrahim v. Sheo Pratap*, A.I.R. 1926 Pat. 129, 89 I.C. 886

So also, if a third party prefers an objection to the attachment and the objection is allowed, in consequence of which the decree-holder has to institute a suit against him, the period of limitation runs as soon as the decree-holder gets a decree in his favour in that suit; and the subsequent application must be made within three years from that period. The fact that that person has preferred an appeal and that appeal has been dismissed will not entitle the decree-holder to count the period of limitation from the date of the appellate decree—*Desraj v. Karam*, 19 All 71 (72). But in another Allahabad case, where the objector's suit was dismissed by the Court of first instance, but decreed on appeal, and was finally dismissed by the High Court in second appeal, it was held that the final decision of the High Court in decree-holder's favour had the effect of reviving the decree-holder's previous application for attachment and sale—*Sheo Prasad v. Indar*, 30 All. 179 (181). But this was merely an *obiter*. If, however, the order of the Court of first instance is irregular and opposed to rule, time runs from the date of the Appellate order confirming the first Court's order—*Narayan v. Sono*, 24 Bom 345 (349).

Where a decree-holder himself purchased the property of the judgment-debtor in execution of the decree, but he lost possession of the same as the result of a suit brought by a third party, his next application for satisfaction of the decree might be treated either as an application for execution (Art 182) or as a revival of the prior execution proceedings (Art 181), and in either case the right to apply arose when the third party's suit was decreed by the Court of first instance or in any case when the decree-holder was actually dispossessed by virtue of that decree, but not on the date when an appeal preferred against that decree was dismissed by the Appellate Court—*Salig Ram v. Lachhman*, 50 All 211, 107 I.C. 42, A.I.R. 1928 All 46 (49).

A final decree for sale was passed on the 7th June 1913, and an application for execution was made on 4th January 1916. While the execution was pending a suit was filed on the 13th November 1916 to obtain a declaration that the property ordered to be sold was not liable to be sold in execution of the decree. On the same day the Court granted an injunction restraining the decree-holder from proceeding with the execution. The suit was dismissed by the trial Court, but was decreed in appeal, but on second appeal the suit was dismissed *in toto* by the High Court on 6th July 1920. Held that the obstacle to the execution of the decree was removed on the 6th July 1920, and an application for revival of the execution proceedings filed within 3 years of this date was within time—*Chattar Singh v. Kamal Singh*, 49 All 276 (F.B.), 100 I.C. 692, A.I.R. 1927 All 16. But it has been held by some cases of the same High Court that where execution is stayed by an injunction, limitation will commence to run as soon as the order granting the injunction is

withdrawn. If the injunction comes to an end by the order of the Court of first instance, limitation will run from the date of the order of that Court, and the fact that an appeal has been preferred by the other party from that order will not entitle the decree-holder to deduct the time of pendency of the appeal—*Balwant v. Budh Singh*, 42 All. 564 (566), *Madho Prasad v. Draupadi*, 43 All. 383 (per Piggot J.; Walsh J. contra). If the injunction comes to an end by the order of the appellate Court, the time for making a fresh application runs from that date, and the fact that there is a second appeal to the High Court will not entitle the decree-holder to calculate the period from the date of the decree of the High Court confirming the lower appellate Court's order—*Rudder v. Dhanpal*, 26 All. 156 (161).

695. Other applications.—A money-decree-holder and his judgment-debtor agreed that the amount of the decree should be payable by instalments and that if default were made in payment of any one instalment the whole decree should be executed. The Court sanctioned this agreement. A default having been made by the judgment-debtor, the decree-holder applied for recovery of the whole amount of the decree. Held that the application of the decree-holder was one to enforce the agreement rather than an application for execution of the decree in the strict sense of the term, and therefore Article 181, and not Article 182, applied. Time ran from the date of the default—*Sham Karan v. Piar*, 5 All. 506.

Where an instalment decree *not* was passed in a mortgage suit, and it provided that a certain sum should be paid every year in *Jeth*, and that if default were made for three years in succession in the payment of the instalments the decree-holder would be at liberty to recover at once the whole amount, *i.e.*, to apply for an order absolute for sale of the property, held that none of the clauses (not even clause 7) in the third column of Article 182 applied to the case, and that Article 181 was the proper Article applicable to an application for enforcement of the instalment decree by an order absolute for sale, and the right to apply for an order absolute for sale accrued on the occurrence of the third consecutive default—*Badri Narayan v. Kunj Behari*, 35 All. 178, 18 I.C. 731.

An application by a judgment-debtor for restoration of immoveable property seized by the decree-holder in excess of what has been decreed is governed by this Article and not by Article 165; because that Article does not apply to an application by a judgment-debtor—*Abdul Karim v. Ismailunnissa*, 39 All. 339. See this case and several other cases cited in Note 669 under Article 165. Time runs when the property claimed by the judgment-debtor has been wrongly delivered to the other party—*Jian v. Abdul Rahman*, 4 Luck. 200, A.I.R. 1929 Oudh 76 (70), 115 I.C. 414.

Where a sale held in execution of a decree was set aside at the instance of the judgment-debtors, and possession was restored to them, an application made by them to recover compensation for the period during

which they were kept out of possession is governed by this Article, as it is an application under the C. P. Code (sec 144) or at least contemplated by the C. P. Code, and must be made within three years from the restoration to possession—*Jagdip v. Holloway*, 2 P.L.J. 206 (208), 39 I.C. 653.

Where pending an appeal to the Privy Council, some of the parties died, and their legal representatives were not brought on the record before the decree, an application to add the representatives as parties to the decree falls under this Article, and the right to apply accrued from the date of the decree—*Kalyani v. Tiruvengadaswami*, 47 Mad. 618, 47 M.L.J. 154, A.I.R. 1924 Mad 695, 80 I.C. 85

An application by a creditor of an insolvent to prove his debt and to have his name inserted in the Schedule was governed by this Article as it was an application under sec 352 of the C. P. Code of 1882, the right to apply accrued from the declaration of the insolvency—*Parshadi Lal v. Chuni Lal*, 6 All 142 (144).

An application by a creditor under sec. 37 of the Prov. Insolvency Act (1907) for a declaration that a sale made by the insolvent within 3 months prior to the application for adjudication is null and void as against the Official Receiver, is governed by this Article, and the starting point of limitation would be the date on which the debtor was adjudicated an insolvent—*Nikka Mal v. Marwar Bank Ltd*, 151 P.R. 1919, 52 I.C. 188. But it is doubtful whether Article 181 would apply, as it is not an application under the C. P. Code. See *Purthi v. Basheshar*, 69 I.C. 403, A.I.R. 1924 Lah. 331.

Application to bring decree in conformity with judgment—Where a decree is not drawn up in accordance with the judgment, an application to the Court to make a decree in accordance with the judgment is not subject to any rule of limitation—*Monmatha v. Matilal*, 33 C.W.N. 614 (617).

Application for extension of time to pay mortgage-debt:—A mortgagor obtained a redemption-decree in 1907, ordering the mortgagor to pay money and redeem within six months. Nothing was paid under the decree. The mortgagor then assigned his interest to G who applied in 1915 to be allowed to pay the money and redeem. It was held that the application was to be treated as one to extend time for payment of the mortgage-debt, and not being provided for elsewhere, fell under this Article, and was barred, as the right to apply accrued on the date of the decree or at the latest on the expiry of the period of 6 months fixed for the payment of the mortgage-debt. Even assuming that it was not merely an application for extension of time for payment of the mortgage-debt but for recovery of possession of the property as in terms it purported to be, it was an application for execution of the redemption-decree, and as such was equally barred under Art 182—*Vasudev v. Gopal*, 43 Bom. 689 (699, 700).

Application for refund of money:—An application by a purchaser for refund of purchase-money, where the sale has been set aside as void upon a suit brought by the judgment-debtor, falls under this Article, and

time runs from the date of the final order (passed by the High Court in second appeal) setting aside the sale—*Girdhari v. Silal Prasad*, 11 All. 372 (374).

So, also, an application by an auction-purchaser, who has failed to obtain possession of the property purchased owing to the judgment-debtor having no saleable interest in the property, for refund of the purchase money after setting aside the sale, is governed by Article 166 so far as the setting aside of sale is concerned, and by Article 181 in respect of refund of purchase-money—*Makar Ali v. Sarfuddin*, 50 Cal. 115 (see this case cited in Note 669 under Article 166).

Where an *ex parte* decree, under which the decree-holder realised the decretal amount, was afterwards set aside, and after retrial of the suit another decree was passed by which the original decretal amount was reduced by a certain sum, an application by the judgment-debtor for refund of the excess amount (*i.e.* the difference between the sum realised by the decree-holder and the sum finally decreed) fell under this Article. The right to apply accrued upon the passing of the latter decree—*Bithal v. Jamna*, 30 All. 476 (478).

The judgment-debtors against whom a decree had been executed, applied for refund of the money which they alleged had been recovered in execution by the decree-holder in excess of what was actually due. Upon this application an account was taken by order of Court. The judgment-debtor then applied to the Court for an order upon the judgment-creditor to refund the excess. It was held that this Article applied to the application, and time began to run when the account was taken (and not when the excess amount had been paid to the decree-holder)—*Mula Raj v. Debi Dihal*, 7 All. 371 (372).

696. Application for ascertainment of mesne profits :—When a decree for possession of immovable property awarded mesne profits which were left to be ascertained in execution under secs. 211, 212 of the C. P. Code 1882, an application for ascertainment of the mesne profits was not governed by any rule of limitation either under Article 181 or Article 182. Article 181 was inapplicable, because it was the duty of the Court to ascertain the mesne profits awarded by a decree, without any application being made. Article 182 was not applicable, because the proceedings for determining the amount of mesne profits were not proceedings in execution of a decree in regard to any fixed sum but merely a continuation of the original suit and carried on in the same way as if a single suit were brought for mesne profits by itself—*Puran Chand v. Roy Radhakishen*, 19 Cal. 132 (136, 138) (F B); *Waliya Bibi v. Nazar Hasan*, 20 All. 623; *Md Umarjan v. Zinet*, 25 All. 385. But it was pointed out by the Madras and Bombay High Courts that since sec. 244 of the old C. P. Code expressly directed that the mesne profits should be ascertained in execution, an application for the ascertainment of mesne profits was consequently an application in execution and the limitation applicable to such application was that applicable for execution applications—*Ramana Reddi v. Babu Reddi*, 37 Mad. 180 (195, 196, 199); *Gangadhar*

v. Balakrishna, 45 Bom. 819 (826, 828); *Usuf Ali v. Papa Miya*, 47 Bom. 778 (781), 25 Bom L.R. 810, 73 I.C. 233, A.I.R. 1923 Bom. 366 (following 45 Bom. 819).

But the ascertainment of mesne profits is now provided in O. 20, r. 12 of the new C. P. Code of 1908, and has been made a part of the suit, and in continuation thereof—*Rudra Pratap v. Sardar Mahesh Prasad*, 47 All. 543. Such a proceeding is no longer a separate proceeding, and an application for ascertainment of mesne profits is no longer an application in execution; consequently Article 182 is not applicable; but it is assumed that Article 181 would now apply to such application—*Harakhpan v. Jagdeb*, 4 Pat. 57, 5 P.L.T. 626, A.I.R. 1924 Pat. 781 (782), 84 I.C. 272, and the right to apply accrues when the delivery of possession is given or three years expire from the date of the preliminary decree—*Ibid.* In two other cases the Patna High Court has expressed the opinion (following 19 Cal. 132 F.B.) that an application for ascertainment of mesne profits being an application in the suit itself is not governed by any provision of the Limitation Act—*Kamakhya Narayan v. Akloo*, 8 Pat. 482, 10 P.L.T. 762, 117 I.C. 647, A.I.R. 1929 Pat. 368; *Bhatu Ram v. Fogal Ram*, 5 Pat. 223, 7 P.L.T. 340, A.I.R. 1926 Pat. 141 (143), 92 I.C. 629. Where a decree for mesne profits has been passed, and an application has been made for ascertainment of the mesne profits, it is not competent to the Court at any stage to dismiss the application, it being beyond its power to dismiss a claim which has already been decreed, and it is always open to the decree-holder to ask the Court to ascertain the mesne profits, in as much as an application for mesne profits is an application in the suit itself. The law of limitation has no application to it so long as the suit is a pending suit—*Bhatu Ram v. Fogal Ram*, supra. The same view has been recently taken by the Bombay High Court—*Shanker v. Gangaram*, 52 Bom. 360, 30 Bom. L.R. 503, 109 I.C. 734, A.I.R. 1928 Bom. 236 (237). The Madras High Court is of opinion that such application is governed by Art. 181 and must be made within 3 years from the date of the preliminary decree for possession—*Timmaraaju v. Narasimha*, 54 M.L.J. 665, A.I.R. 1928 Mad. 522, 109 I.C. 528.

697. Application in pending suits:—An application in a pending suit desiring the Court to proceed to judgment is not governed by any rule of limitation. Thus, where in a suit for dissolution of partnership, a preliminary decree has been passed dissolving the partnership, appointing a commissioner to examine the report and accounts, and directing the defendant to collect outstandings and to account to the other partners for the same, an application to the Court to pass a final decree in pursuance of that direction is an application in a pending suit, and is not governed by Article 181 or by any other Article. Consequently it is not barred if brought more than 3 years after the date of the preliminary decree—*Ramanathan v. Alagappa*, 53 Mad. 378, A.I.R. 1930 Mad. 529 (533), 59 M.L.J. 102. Where a decree for partition has been passed, an application for the appointment of a commissioner to work out the shares recoverable under the decree is a step in the suit itself, and not subject

* to any rule of limitation—*Srinivasa v. Ramasami*, 2 L.W. 693, 1915 M.W.N. 725, 30 I.C. 380 See also *Kedar Nath v. Harra Chand*, 8 Cal. 420.

Application for restitution :—See Note 718 under Article 182.

Application by Governmer.! exemption from the provisions of the tions . Therefore an application by th the Code of Civil Procedure (1882) to recover the amount of Court-tees from a party ordered by the decree to pay the same is subject to the provisions of this Article—*Appaya v. Collector of Vizagapatam*, 4 Mad. 155 (156)

Application by minor :—Section 6 refers only to an application for the execution of a decree, and does not apply to an application under this Article. Consequently a minor in making an application for a final decree for sale on a mortgage (which is now governed by this Article) cannot get the privilege of section 6—*Nizamuddin v. Bohra Bhim Sen*, 40 All. 203 (205); *Vinayakrao v. Baijnath*, 15 N.L.R. 36, 48 I.C. 934.

- 182.—For the execu- Three 1. The date of the
tion of a decree or years; or decree or order; or
order of any Civil where a
Court not provided certified
for by Article 183 copy 2. (where there has
or by section 48 of of the been appeal) the
the Code of Civil decree date of the final
Procedure, 1908. or order of the Appellate
has been Court or the with-
regis- drawal of the
tered, appeal; or
six years. 3. (where there has
been a review of
judgment) the date
of the decision
passed on the re-
view; or
4. (where the decree
has been amend-
ed) the date of
amendment; or
5. (where the appli-
cation next here-
inafter mentioned

182.—For the execu- Three
tion of a decree or years; or
order of any Civil where a
Court not provided certified
for by Article 183 copy
or by section 48 of of the
the Code of Civil decree
procedure, 1908. or order
has been
regis-
tered,
six years.

has been made)
the date of the
final order passed
on an application
made in accord-
ance with law to
the proper Court
for execution, or
to take some step-
in-aid of execution
of the decree or
order; or

6. (in respect of any
amount recovered
by execution of
the decree or
order, which the
decree-holder has
been directed to
refund by a decree
passed in a suit
for such refund)
the date of such
last mentioned
decree, or in the
case of an appeal
therefrom, the date
of the final decree
of the appellate
Court or of the
withdrawal of the
appeal;
7. (where the appli-
cation is to enforce
any payment
which the decree
or order directs to
be made at a cer-
tain date) such
date.

Explanation I.—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 5 of this Article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application if made against any one or more of them, or against his or their representatives, shall take effect against them all.

Explanation II.—"Proper Court" means the Court whose duty it is to execute the decree or order.

This Article corresponds to Art. 179 of Act XV of 1877. Clause 4 did not exist in the old Act. Clauses 5, 6 and 7 correspond to clauses 4, 5 and 6 respectively of Article 179 of the old Act.

Change :—Clauses 5 and 6 have been amended by the Indian Limitation (second Amendment) Act 1927 (IX of 1927). For amendment of clause 5, see Note 709 below. Clause 6 is entirely new; see Note 718.

698. The law of limitation applicable to proceedings in execution is not the law under which the suit was instituted, but the law in force at the date of the application for execution. Therefore, where the suit had been instituted under the Act of 1871, but the application for execution of the decree was made when the Act of 1877 came into operation, the application would be governed by the latter Act—*Gurupadapa v. Virbhadrappa*, 7 Bom. 459; *Kuppu v. Saminath*, 18 Mad. 482; *Becharam Dutt v. Abdul Wahed*, 11 Cal. 55 (dissenting from *Behari Lal v. Gobardhan*, 9 Cal. 446); *Jagmohun Mahto v. Luchmessur Singh*, 10 Cal. 748.

699. Applications under this Article :—Application for restitution :—See Note 718 below.

Execution by a co-sharer :—An application for execution of a decree for a sum not exceeding Rs. 500 obtained by a co-sharer landlord for his share of the rent is governed by this Article and not by Article 6.

Schedule III of the Bengal Tenancy Act. The latter provision is not applicable to the case, because the Bengal Tenancy Act (sec. 188) does not contemplate a suit by one co-sharer only but only contemplates a suit brought by all the joint landlords acting together or by their authorised agent—*Kedar Nath v. Ardha Chundra*, 29 Cal. 54 (58).

Execution of order of contribution:—After the winding-up of a company, and the passing of an order of contribution, an application for enforcement of the order of contribution against a contributory is governed by this Article, in as much as the order of contribution must be enforced in the same manner as a decree of Court—*People's Industrial Bank v. Mahesh Charan*, 1 Luck. 153, 93 I.C. 631, A.I.R. 1926 Oudh, 289.

700. Application by minor:—This Article provides several points of time from which the period of three years shall begin to run, and for the purposes of this Act the period which begins from each point is a separate period, and if the person entitled is under a disability at the time when any one of such period commences, the operation of this Act is suspended during the continuance of the disability by the operation of sec. 6. Therefore, a step taken in aid of execution by a minor during his minority more than three years after a previous step-in-aid of execution taken by him, is not barred—*Lolit Mohun v. Janoky*, 20 Cal. 714 (716).

Application by Government:—Government is bound to make an application for execution within the same time as any private person—*Collector v. Sreehury*, 22 W.R. 512; see also *Appaya v. Collector*, 4 Mad. 155.

701. Clause (1):—Under clause 1, time runs from the date of the decree; it therefore applies only to those cases where the decree is executable from the very date on which it is passed. If the decree is not so executable and the other clauses of this Article are also inappropriate to the case, then this Article cannot apply and Article 181 will govern the application. See Note 693 in Article 181 under heading "Applications for execution." As observed by the Privy Council, this clause contemplates only a decree or order made in such form as to render it capable of being enforced in execution; if a further application is necessary to make the decree executable then Article 181 applies to such further application—*Rameshwar, Maharaja of Darbhanga v. Homeshwar*, 6 P.L.J. 132 (139) (P.C.), A.I.R. 1921 P.C. 31, 59 I.C. 636.

When in a redemption-decree no time is fixed for payment, the decree can be executed from the date on which it is passed, and an application to execute the decree (i.e., to redeem the mortgage) is governed by the rule of limitation under clause 1 of this Article—*Krishna Chandra v. Jakeral*, 10 C.L.J. 115, 1 I.C. 71; *Maloji v. Sagaji*, 13 Bom 567; *Narain Das v. Uddan*, 68 P.R. 1913, 44 P.L.R. 1913, 18 I.C. 48.

Even though the redemption-decree fixes a time for payment, the decree is executable by the decree-holder (mortgagor) from the date of the passing of the decree, because it is open to the mortgagor to pay the

decretal amount on the very date of the decree. An application to execute the decree is governed by this Article—*Etyati Pooparambil v. Matalakot Krishna*, 28 Mad. 211; *Maruti v. Krishna*, 23 Bom. 592.

In 1908, a decree was made *ex parte* against three brothers, D, U and G. In 1912, G applied for an order to set aside the *ex parte* decree. In 1913 the Court granted the application so far as G was concerned. On the rehearing of the case against G, no notice was given to D and U, and in September 1913, the suit was dismissed against G and decree *ex parte* against D and U. The decree-holder applied in July 1916 for execution of the decree of September 1913 against D and U. Held that the decree of September 1913 against D and U was neither an amendment nor a review of the original decree of 1908, and hence clauses (3) or (4) did not apply; that the decree of September 1913 was a mere surplusage and a nullity; that the decree of 1908 had remained enforceable throughout and had from that date remained enforceable throughout; that the present application must be deemed to be one for the execution of the decree of 1908, and therefore barred under this clause—*Umesh Chandra v. Akrur*, 46 Cal. 25 (29, 30), 50 I.C. 15.

An application for execution of an *ex parte* decree, against which no appeal is preferred, is governed by clause 1, and the time taken by the defendant in prosecuting his application for setting aside the *ex parte* decree cannot be deducted—*Jabar Khan v. Rahim Khan*, 18 N.L.R. 190, A.I.R. 1922 Nag. 197, 68 I.C. 728.

A pre-emption decree is incapable of execution until the decree-holder pays the pre-emptive price in Court, and consequently clause 1 is inapplicable; and no other clause of Article 182 being under the circumstances applicable, Article 181 would apply to an application for the execution of such decree—*Chhedu v. Lalu*, 24 All. 300; *Chandika v. Kalu*, 22 O.C. 82, 52 I.C. 157. Mr. Rustomji is of opinion that such decree is capable of immediate execution, as it is open to the decree-holder to pay the price on the day the decree is passed, and therefore an application for execution comes within clause 1 of Art. 182: Rustomji's Limitation, 3rd Edn., p. 723. Where there was a direction in a pre-emption decree that the purchase money should be deposited in Court within 31 days from the date of its being final, the decree did not become final until the time for the appeal allowed by law had expired, or, if appealed from, had been decided by the ultimate appellate Court—*Sheikh Ewaz v. Mokuna Bibi*, 1 All. 132; *Ramsahai v. Gaya*, 7 All. 107.

702. Date of the decree :—The date of the decree is the date on which the judgment is pronounced (O. 20, rule 7 of the C. P. Code) and not the date on which the decree is actually prepared and signed by the Court—*Afzal v. Umda*, 1 C.W.N. 93, *Rakhal v. Jogendra*, 10 C.L.J. 467, 3 I.C. 391; *Surajdeo v. Musahroo*, 20 C.W.N. 950, 1 P.L.J. 359, 34 I.C. 504; *Hiralal v. Jamuna Prosad*, 5 P.L.J. 490, 1 P.L.T. 394, 51 I.C. 531; *Golam v. Goljan*, 25 Cal. 109; *Narsingrao v. Bando*, 42 Bom. 309 (317); and the fact that the Court-fee required to be paid in order to validate the decree (which was passed in a suit for accounts) was not paid

till some months later would not give a different starting point; nor would the payment of Court-fee constitute a step-in-aid of execution within the meaning of clause 5—*Bhajan v. Girish*, 17 C.W.N. 959, 19 I.C. 410.

Time runs from the date of the final decree. Thus, a decree for sale on a mortgage was passed against several defendants jointly on the 25th August 1900, and made absolute on the 21st December 1901. As against one of the defendants the decree was *ex parte*, and it was set aside as against her on the 11th March 1902. Subsequently a decree was passed on the merits against her also on November 16, 1904 and it was made absolute on November 27, 1905. Held that the latter decree supplemented and completed the decree previously passed, and limitation for execution ran from the date of the latter decree (Nov 27, 1905), that being the "date of the decree" under this clause—*Ashfaq Hussain v. Gouri Sahai*, 33 All 264 (P C).

703. Clause (2)—Appeal :—A decree-holder is entitled to wait until the decision of the lower appellate Court before applying for execution of the decree of the Court of first instance, and the period of limitation runs from the date of the decree of the lower Appellate Court—*Krishna Lal v. Satyabala*, 51 Cal 342, 81 I.C. 569, A.I.R. 1924 Cal. 686. If there is a second appeal to the High Court, time runs from the date of the judgment of the High Court—*Nagendra v. Ambica*, 33 C.W.N. 958 (959). Time is to be calculated from the date of the appellate decree, whether that decree affirms or modifies or sets aside the original decree—*Mid Mehdi v. Mohini Kanta*, 34 Cal. 874, *Kristnama v. Mangammal*, 26 Mad 91 (95), *Sahu Nandlal v. Sahu Dharam*, 48 All 377, A.I.R. 1926 All 440, 94 I.C. 961.

The words "where there has been an appeal" mean 'where a memorandum of appeal has been presented to the proper Court' and not 'where the memorandum has been presented and admitted'. Therefore, if a memorandum of appeal was *rejected* for non-payment of additional court-fees declared to be leviable thereon, limitation would still run from the date of the Appellate Court's order of rejection—*Rup Singh v. Mukhraj Singh*, 7 All. 887, *Basanta Kumar v. Manjuri*, 74 I.C. 679, A.I.R. 1924 Cal 349.

It is sufficient that an appeal has been presented and heard, to bring the case under this clause, although the appellate Court may have decided that no appeal would lie—*Wazir Mohan v. Lalit Singh*, 9 Cal. 100. (But the Allahabad High Court holds *contra* in *Sahu Nandlal v. Sahu Dharam*, 48 All 377). So also, a decree of the Appellate Court dismissing the appeal as barred by limitation will give a fresh starting point of limitation—*Akshoy v. Chunder Mohan*, 16 Cal. 250. Similarly, an order of the Appellate Court dismissing the appeal for non-payment of printing costs or by reason of the appellant not pressing the appeal is an appellate order within the meaning of this clause—*Ragho Prasad v. Jadunandan*, 6 P.L.J. 27, A.I.R. 1921 Pat 6, 2 P.L.T. 28, 59 I.C. 896; *Fazlur Rahman v. Shah Mohammad*, 30 All. 385.

date of such return, as the starting point. Such an order returning an appeal is neither a final order of an Appellate Court nor a withdrawal of the appeal—*Mahomed Abdul Kadir v. Samipandia*, 43 Mad. 835 (837), 39 M.L.J. 431, 60 I.C. 267. The order of the Appellate Court contemplated in this clause is an order which disposes of the appeal *on the merits* in some form, and not simply one which intimates to the party that the appeal should be filed elsewhere—*Ibid* (p. 841). But see 7 All. 887, 16 Cal. 250, 6 P.L.J. 27 and other cases cited above where the dismissal of appeal on the ground of non-payment of Court fee or for default of prosecution was held to be an appellate order, although the order did not dispose of the appeal *on the merits*.

Appeal from amended decree:—See 33 C.W.N. 958 in Note 706 below.

Appeal to Privy Council.—The word “appeal” includes an appeal to the Privy Council and the term “Appellate Court” includes the judicial Committee of the Privy Council sitting for the purpose of hearing appeals from orders passed by British Courts in India—*Gopal v. Joyram*, 7 Cal. 620; *Narsingh v. Narayan*, 2 All 763; *Kishen v. Collector of Allahabad*, 4 All. 137. See also *Somar Singh v. Premdei*, 3 Pat. 327, A.I.R. 1925 Pat. 40, 5 P.L.T. 21, 79 I.C. 794. In such a case the only order capable of execution is the order of the Privy Council, and the period of limitation is 12 years under Art 183. See Note 722 under Art 183.

But an order of the Privy Council dismissing an appeal *for want of prosecution* is not a judicial determination of the matter in suit; therefore it is neither to be treated as a decree or order of the Appellate Court, nor does it amount to an affirmance of the decision appealed from; and in such a case the only decree capable of execution is the decree appealed against, *i.e.*, the decree of the High Court—*Abdul Majid v. Jawahir*, 36 All. 350 (353) P.C. (reversing *Abdul Majid v. Jawahir*, 33 All. 154); *Baluk Nath v. Munni Dei*, 36 All 284 (288) (P.C.); *Sachindra Nath v. Maharaj Bahadur Singh*, 49 Cal 203 (213) P.C.

703A. Appeal as to part of the decree:—Though an appeal is preferred in respect of only a part of the decree, limitation will be saved as regards the entire decree—*Imam v. Dasaundhi*, 1 All. 508. The intention of the Legislature is to treat the *decree as a whole*, although only a part of the decree may be the subject of an appeal—*Vydlanatha v. Subramania*, 36 Mad. 104 (106). Thus, where the plaintiff preferred an appeal against a part of the decree which was adverse to him (*e.g.* as regards a part of the claim which was disallowed) and then being defeated in the appeal, made an application to execute the unappealed portion of the decree, time began to run from the date of the appellate decree—*Kristo Churn v. Radha Churn*, 19 Cal. 750 (754); *Abdul v. Maidin*, 22 Bom. 500, *Krishnama v. Mangammal*, 26 Mad. 91 (93) F.B. (dissenting from *Muthu v. Chellappa*, 12 Mad. 479). As observed by the Calcutta High Court, the Court executing the decree need not go into questions so complicated as those which must sometimes arise in determining whether in such a case the whole decree was or might have become or

became imperilled in the Court of Appeal. The Court should follow the plain meaning of the words of Article 182, viz., that the period of limitation runs from the date of the decree or order of the Appellate Court, whenever there has been an appeal—*Krishto Churn v Radha Churn*, (supra); *Kristnama v. Mangammal*, 26 Mad. 91 (93). The word 'appeal' in this Article does not mean only an appeal against the whole decree and by which the whole decree is imperilled, it means any appeal by any party. The words of this Article must be construed in their natural sense as permitting an extension of time whenever an appeal is preferred—*Abdul Rahman v. Maidin*, 22 Bom 500 (505, 508). In any case in which there has been an appeal from a decree, limitation shall begin to run from the date of the decree on appeal, irrespective of whether the decree was appealed from in whole or in part. When a portion of the decree is appealed from, and a portion is not appealed from, the appellate Court, in adjudicating on the appeal affirms the portion of the decree to which no exception has been taken, and though the appellate decree does not in terms affirm that portion, it must be construed as so doing; and limitation runs from the date of the decree on appeal—*Krishnama v. Mangammal*, 26 Mad 91 (92, 93). When a person obtains a decree for only a portion of the amount or the properties claimed by him and prefers an infructuous appeal as regards the disallowed portion, limitation for execution as regards the portion allowed will run from the date of the appellate decree. Here there is but one decree, for it cannot be argued that in this case there was one decree so far as the plaintiff's claim was allowed, and another and separate decree so far as the plaintiff's claim failed—*Harkant v Biraj Mohan*, 23 Cal 876 (883), *Abdul Alim v Abdul Hakim*, 53 Cal 901, 31 C.W.N 262, A I R 1927 Cal 89, 97 I C 838, *Sakhalchand v Velchand*, 18 Bom 203 (205). When a decree is appealed against, even though the appellant appeals against only a portion of the decree, the whole decree of the first Court is superseded by or becomes merged in the decree of the Appellate Court, and there is no part of the first Court's decree that remains to be executed. No part of the decree of the first Court can be held to be in separate existence after an appeal in the suit has been decided. Hence time for execution of the part of the decree not appealed against runs from the date of the Appellate Court's decree—*Abdul Alim v Abdul Hakim*, 53 Cal 901, 31 C.W.N 262 (264), A I R 1927 Cal 89, 97 I C 838. The words "where there is an appeal" mean that once there was an appeal, time ran from the date of the decision in the appeal, and there is no suggestion that it would be material as to whether all or only some of the parties appealed or whether the whole or only a part of the decree was challenged. Though the decree may decide a number of matters in controversy, there is only one decree and not a number of decrees. The Appellate Court deals with the decree as a whole, and after appeal, the only decree that can be executed is the decree of the Appellate Court whether it reverses, modifies or confirms the decree of the lower Court—*Ibid*. Where certain plaintiffs obtained a decree for pre-emption in respect of four villages and the defendants appealed but the Lower Appellate Court dismissed

the appeal, and the defendants again appealed to the High Court, but in this appeal they questioned the decision of the Lower Appellate Court in respect of two of the villages in suit, and in the second appeal the plaintiff's suit was dismissed as to one of the villages with regard to which the appeal was preferred and the defendants' appeal was dismissed as to the other village; it was held that in respect of all the three villages as to which the final decree stood in favour of the plaintiffs, limitation began to run from the date of the decree in second appeal, and not as to two of them from the date of the Lower Appellate Court's decree—*Badiunnissa v. Shamsuddin*, 17 All. 103 (105). [It should be noted that in all these cases the parties in the original suit and the parties in the appeal were the same.]

Appeal against some of the defendants:—The plaintiff brought a suit against A and B. The suit against A was decreed, but it was dismissed as against B. The plaintiff appealed against the dismissal but did not implead A as a party respondent in the appeal. His appeal was dismissed. Held that the period of limitation for the execution of the decree against A ran from the date of appellate order of dismissal—*Satis Chandra v. Girish Chandra*, 47 Cal. 813, 60 I.C. 915. But in *Raghunath v. Abdul Hye*, 14 Cal. 20, it was held that in such a case time ran from the date of the original decree. In *Muthu v. Chellappa*, 12 Mad. 470, it is laid down that even though A is made a party respondent in the appeal, the time for applying for execution against A would run from the date of the original decree, because A was not a necessary party to the appeal, and the original decree as against A was not imperilled by the appeal preferred by the plaintiff against B.

Appeal against decree for partition:—Where a final decree for partition directed one set of defendants to pay the costs of another set of defendants, but the decree was appealed against by the plaintiffs, and the different sets of the defendants were all made parties to the appeal, and the appeal was dismissed, the period of limitation for the recovery of the costs awarded to the one set of defendants against the other ran from the date of dismissal of the appeal; because when the appeal against the final decree was filed by the plaintiffs in the partition suit, the entire partition was under review, and if it so happened that any relief had been given to the plaintiffs in that appeal, the necessary consequence would have been that the whole partition decree would have had to be altered—*Kashi Prasad v. Mathura Prasad* 48 All. 6, 23 A.L.J. 878, 89 I.C. 286, A.L.R. 1926 All. 145.

703B. Appeal by some of the defendants:—If the decree passed against the defendants was a *joint one*, and an appeal was preferred by some of the defendants, the appeal would imperil the whole decree, and the time for execution against the non-appealing defendants would run from the date of the appellate decree, and not from that of the original decree—*Gopal v. Gosain*, 25 Cal. 594 (F.B.); *Mullick Ahmed v. Md. Sayed*, 6 Cal. 191; *Loke Nath v. Gaju*, 20 C.W.N. 178, 31 I.C. 426; *Pancho Banla v. Anand Thakur*, 2 Pat. 712 (714), A.L.R. 1924 Pat. 160.

77 I C. 357; *Shivaram v. Sakharam*, 33 Bom 39; *Basant Lal v. Najmunnessa Bibi*, 6 All. 14 (15). Cf. *Gauri v. Ashjak*, 29 All. 623 (626). (But see *Abdul Khadir v. Ahammad*, 38 Mad. 419, 423 (obiter), where White C. J. observes that it would be inequitable that a judgment debtor should be deprived of the benefit of the prescribed limitation by reason of acts of his joint judgment-debtor over whom he has presumably no control, and for whose action he is not responsible)

Where a decree is passed severally (not jointly) against several defendants individually (though in form there is but one decree contained in one piece of paper) and an appeal is preferred only by some of the defendants on a ground not common to all the defendants, the time for execution against the non-appealing defendants will run from the date of the original decree, and not from that of the appellate decree, and this clause will not apply, because, in such a case the rights of the non-appealing defendants would not be affected by the appeal, nor would their liabilities be extended or varied—*Mashiatunnissa v. Rani*, 13 All 1 (F.B.); *Wise v. Rajnarain*, 10 B L R 258, *Raghunath v. Abdul Hye*, 14 Cal 26 (32); *Sangram Singh v. Bujharat Singh*, 4 All. 36 (37). Where the decree is for separate sums found to be due from separate defendants, and only one defendant appeals, execution as against the non-appealing defendants can only be of the original decree, because in such a case, the whole decree is not in peril and the plaintiff might execute his decree against the non-appealing defendants without waiting for the decision of the appeal—*Abdul v. Moidin*, 22 Bom. 500 (507); *Raghunath v. Abdul Hye*, 14 Cal 26 (32, 33), *Sangram Singh v. Bujharat*, 4 All 36 (37). Where a decree was passed against two persons and one of them appealed, but the circumstances of the case were such that the whole decree was imperilled by the appeal, held that the time for an application for execution against the non-appealing defendant would run from the date of the appellate decree and not from the date of the original decree—*Nundun Lal v. Rai Joy Kishen* 16 Cal 598 (602); *Nur-ul-Hasan v. Md Hasan*, 8 All 573 (575), *Viraraghava v. Pannamma*, 23 Mad 60 (67).

Therefore, in dealing with the question of limitation for an application for execution of a decree, where there has been an appeal, the Court should see whether the original decree was a joint decree or an incorporation of several decrees, and whether the appeal against it imperilled the whole decree or not—*Christiana Sens Law v. Benarasi Prasad*, 19 C & N 287 (289), 22 I C 685. *Pancho Bania v. Anand Thakur*, 2 Pat 712 (714), A I R 1924 Pat 160, 77 I C 357.

In some cases, however, the judges are unwilling to draw a distinction between a joint and a several decree, and they refuse to enter into such subtle points as to whether the decree is imperilled or not by the appeal of one defendant only. Thus, in a Madras case it has been remarked that even though all the judgment-debtors do not appeal, no question arises as to whether the decree as against the remaining judgment-debtors is imperilled by the appeal or not. The words of clause 2 of this Article are clear and should be followed by the Court, viz. that whenever an

appeal is preferred, the period of limitation runs from the date of the final decree of the Appellate Court; whether all the judgment-debtors or some only of them have appealed, makes no difference. There is only one decree that can be executed, and that is the final decree of the Appellate Court—*Viraraghava v. Ponnammal*, 23 Mad. 60 (67) (dissenting from *Muthu v. Chalappa*, 12 Mad 479). In a more recent case the same High Court observes that the question of limitation ought not to be made to depend upon the difficult and doubtful point whether an appeal by one of the defendants as against a part of the decree of the first Court imperils the decree passed against the other defendants or the other portion of the decree. Such subtle distinction not warranted by the language of the Legislature should not be introduced by the Courts—*Ari Chetty v. Theerthamalai*, 3 L W 521, 34 I.C. 791. In the Full Bench case of *Mashiatunissa v. Rani*, 13 All. 1, the minority of the Judges (Mahmud and Broadhurst J.J.) have expressed the view that the words "decree" in clause 2 of Article 182 should not be qualified by any such epithet as "joint" or "several," that the words of Article 182 are so clear and distinct that they scarcely admit of any such distinction being drawn, and that the Article contains nothing as to whether the appeal shall have been made by all the parties or by one, or how far the appellate Court's order may or may not affect the rights of parties who have not appealed. The same opinion has been expressed by Maclean C.J. in the Calcutta Full Bench case of *Gopal Chander v. Gosain*, 25 Cal 594 (599, 602), and has been approved of in the recent Calcutta case, *Abdul Alim v. Abdul Hakim*, 53 Cal 901, 31 C.W.N. 262 (263, 268). This view was also taken in an earlier Allahabad case, *Nurul Hasan v. Muhammad Hasan*, 8 All 573 (575, 576). A recent case of the Patna High Court also seems to support this view—*Somar Singh v. Premdei*, 3 Pat 327 (336), 79 I.C. 794, A.I.R. 1925 Pat 40; and the Punjab Chief Court was also of the same opinion in *Anwar Ali v. Inayat Ali*, 32 P.R. 1907. In *Shivram v. Sakharam*, 33 Bom. 39 (43), the Bombay High Court has held that the plain words of clause 2 of Article 182 should not be disregarded; and therefore if there is an appeal by some of the defendants, the period of limitation for execution against all the defendants including those who have not appealed, runs from the date of the appellate decree. This case has been followed in another recent case where the period of limitation for execution against the sureties of the defendants have been held to run from the date of the Appellate decree, even though the sureties were not parties in the appeal—*Cholappa v. Ramchandra*, 44 Bom. 34 (40, 42), 21 Bom. L R 861, 53 I C 187.

704. Withdrawal of appeal :—The words "or the withdrawal of the appeal" did not exist in the Act of 1877, and were for the first time introduced into the Act of 1908 to remove the conflict of decisions which existed under the Act of 1877 as to whether the withdrawal of an appeal did or did not give a fresh starting point for limitation. In the case of *Ramanuja v. Lakshmi*, 30 Mad. 1 (F.B.) it was held that the withdrawal of the appeal gave a fresh period; whereas the contrary opinion was expressed in the case of *Patolji v. Ganu*, 15 Bom. 370; *Chudasama*

v. *Mohant Iswargar*, 16 Bom. 243, *Abdul v. Moidin*, 22 Bom. 500 (506), *Bhagwan v. Mohan Lal*, 54 P.R. 1908, and *Kanara v. Govind*, 1 M.L.J. 745. These 5 cases are now superseded.

Where an appeal is filed against the decree but withdrawn, an application to execute the decree made within three years of the date allowing withdrawal of the appeal is not time-barred—*Ram Chandra v. Nazar Ali*, 24 A.L.J. 544, 94 I.C. 390, A I R. 1926 J. 153.

705. Clause 3—Review of judgment :—Owing to the absence of any provision in the old Act as regards amendment of decree, it was held in some cases that the term "review of judgment" in this clause included amendment of decree—*Kali Prasanna v. Lal Mohan*, 25 Cal. 258, *Venkata Jogayya v. Venkata Simhadri*, 24 Mad 25 (26). Under the present Article a separate provision has been made in clause 4 for amendment of decree. See Note 706 below.

In order to save limitation there must have been actually a review; a mere application for review or a refusal of the application for review cannot give a fresh starting point—*Kurupam v. Sadasiva*, 10 Mad. 66; *Mastan v. Phalwan*, 81 P.L.R. 1909, 4 I.C. 629. An order dismissing an application for the rehearing or review of a suit which has been dismissed for default is not a review of judgment—*Raj Brijraj v. Nauratan*, 3 P.L.J. 119, 44 I.C. 575.

As in the case of appeal, so in the case of review or amendment of decree, it may be said that if only a part of the decree is sought to be reviewed or amended, limitation is saved as regards the whole decree. The intention of the Legislature is to treat the decree as a whole, although only a part may be the subject of an appeal or an application for review or amendment. Limitation runs with respect to the execution of the whole decree, only when the proceedings in appeal, review or amendment come to an end—*Vydanatha v. Subramania*, 36 Mad. 104 (106).

706. Clause 4—Amendment of decree :—This clause has been introduced for the first time into the Act of 1908, to set at rest the conflict of opinion which existed as to the question whether, when a decree was amended, limitation ran from the date of the decree or from the date of the amendment. In some cases an amendment of the decree was regarded as a review of judgment and therefore time ran under clause 3 from the date of amendment—*Kali Prasanna v. Lal Mohan*, 25 Cal. 258, *Kishen Sahi v. Collector*, 4 All. 137 (141); *Venkata Jogayya v. Venkata Simhadri*, 24 Mad 25; *Vishvanathan v. Ramanathan*, 24 Mad 646. This view was however doubted in another Calcutta case, *Rakhal v. Jogendra*, 10 C.L.J. 467, 3 I.C. 391. Another Allahabad case went so far as to say that as there was no clause of this Article applicable to amendment of decree, Article 181 applied and time ran from the date of the amendment—*Muhammad Suleman v. Muhammad Yar*, 17 All. 39. This divergence of opinion is now set at rest by the specific provision contained in the present clause.

If a decree has been amended, time runs under this clause from the

date of the amendment—*Narotum v. Sukhray*, 3 Luck. 719, A.I.R. 1928 Oudh 442 (448), 116 I.C. 49. The 'date of amendment' means the date of the judgment ordering the amendment (on the analogous principle that a decree bears the date on which judgment is delivered) and not the date on which the decree is actually amended—*Nirit v. Kalananda*, 36 I.C. 533 (Patna); *Venkataswami v. Venkatasubba*, 49 Mad. 807, 50 M.L.J. 554, 95 I.C. 196, A.I.R. 1926 Mad. 747.

Where a decree was incapable of execution at the time when it was passed (in as much as it did not at all specify the relief granted or did not contain the names of the judgment-debtor and decree-holders), time ran from the date of amendment, even though the amendment was made more than 3 years after the decree was passed—*Mohamaya v. Abdul Hamid*, 18 C.W.N. 266 (268), 21 I.C. 615; *Sanatan v. Dinabandhu*, 34 C.L.J. 397, A.I.R. 1921 Cal. 89, 64 I.C. 622. In other words, a barred decree is revived by amendment, and time for execution runs from the date of amendment, provided that the decree was incapable of execution before the amendment. If, however, the decree was capable of execution before the amendment, and contained a mere orthographical or clerical error (e.g. where a person's name was wrongly written as Jwala Prasad instead of Joti Prasad, which may be easily mixed up in Urdu writing, or where the decree was passed against a dead person, through a clerical error, but the decree-holder knew who the legal representatives of the deceased were), an application for execution made more than three years after the date of decree is barred, and the decree-holder cannot take advantage of such slight errors and claim an enlarged period of limitation because of the amendment—*Maharani v. Debi Das*, 27 A.L.J. 427, 115 I.C. 118, A.I.R. 1929 All. 253 (254), *Anandram v. Nityananda*, 32 I.C. 744 (Cal); *Rabiuddin v. Ram Kanai*, 59 I.C. 186 (Cal). Where an amendment in an *ex parte* rent decree consisted merely in a correction of the rate of rent, the amount of rent decreed remaining the same, such amendment could not revive a barred decree and provide a fresh starting point, for the amendment was made merely in an ancillary part of the decree. Here it could not be said that the decree was incapable of execution before the amendment—*Raja Kalanand v. Rajkumar*, 2 P.L.J. 286 (287), 39 I.C. 624.

In a recent case the Calcutta High Court has laid down that if a decree has been amended, the period of limitation should run, according to the plain language of this clause, from the date of the amendment irrespective of the question whether the amendment was properly made or whether the decree was capable of execution at the time when it was passed, or whether the Court was wrong in making the order of amendment. It is not for the executing Court to enquire into these questions, because that Court does not sit as a Court of appeal over the Court which has passed the decree or made the amendment. What the executing Court has to see is whether the decree has been amended and whether the application for execution has been prescribed within three years of the date of the amendment. To introduce other considerations as regards the correctness or propriety of the amendment would be to usurp the functions of a Court of appeal—*Durga Prasad v. Kedar Nath*, A.I.R. 1929

Cal. 850 (651). Following this ruling the Patna High Court has observed (after reviewing all the cases on this point) that if the application for amendment had been made within three years from the date of the decree, and the application for execution has been made within three years from the date of the amendment, the execution is not barred, although the amendment was made by the Court more than three years after the date of the decree. The execution Court is not entitled to introduce other considerations into the case, such as the validity of the amendment or whether the decree was capable of execution before amendment—*Bhagwati v. Narsingh*, 11 P.L.T. 181, A.I.R. 1930 Pat. 286 (288), 125 I.C. 785.

Appeal against amended decree—Where a decree was amended, on the application of the decree-holder, and then the judgment-debtor appealed against the amended decree to the District Judge and finally to the High Court, which dismissed the appeal, *held* that time ran from the date of the judgment of the High Court, and not from the date of the amendment, because there was an appeal against the *decree as amended*. An appeal from an amended decree stands on the same footing as an appeal from any other decree, and gives a fresh starting point for limitation—*Nagendra v. Ambica*, 33 C.W.N. 958 (960), 50 C.L.J. 12, A.I.R. 1929 Cal. 676.

707. Clause 5 :—Application :—The *defence* by the decree-holder of an appeal preferred by the judgment-debtor in an execution proceeding is not an *application* to take a step-in-aid of execution—*Baij Nath v. Hari Charan*, 48 I.C. 187 (Pat.). This clause requires that the decree-holder should make a direct and independent application for execution of his decree on his own account; a resistance by him to the execution of another man's decree cannot be a step-in-aid of execution of his own decree—*Shib Lal v. Dadha Kishen*, 7 All. 898.

There must be an *application* by the decree-holder to take some step-in-aid of execution. In the absence of any evidence to the effect that such an application was made, a mere order by the Court that the decree-holder should take the necessary steps will not bring the next application for execution within time—*Kara Pasu v. Ramnath*, 8 P.L.T. 670, A.I.R. 1927 Pat. 323, 103 I.C. 37. But where an order made in aid of execution is of such a nature that the Court could not have made it without an application by the decree-holder, it may be *presumed* that due application (possibly an oral one) had been made for it—*Trimback v. Kashinath*, 22 Bom. 722; *Mulchand v. Jamanbi*, 27 Bom. L.R. 671, A.I.R. 1925 Bom. 443, 89 I.C. 228; *Adimuthu v. Adiappa*, 12 Bur. L.T. 113, 52 I.C. 656. Thus, where there was an order of the Court to the effect that the service of notice to the judgment-debtor was proved and that a warrant be issued for his arrest, *held* that the order showed conclusively that the Court must have acted on some application (possibly oral) made by the decree-holder—*Mohan Lal v. Kashimuddin*, 47 C.L.J. 362, A.I.R. 1928 Cal. 302, 108 I.C. 588; *Somasundaram v. Ma Shwe*, 7 Rang. 132, A.I.R. 1929 Rang. 152 (153), 117 I.C. 578.

In the absence of any application, the mere appearance of the decree-holder in a proceeding under O. 21, r. 90, C. P. Code, cannot amount

to a step-in-aid of execution and save limitation in respect of a subsequent application—*Baldeo v. Lachman*, 6 Pat. 280, A.I.R. 1927 Pat. 113, 99 I.C. 869.

It is necessary that the prior application must have been made by the decree-holder; where an application was made by the judgment-debtor for postponement of the sale, and the decree-holder consented to the postponement, held that there was no application by the decree-holder and the consent of the decree-holder to the postponement could not be treated as an "application" made by him so as to save the bar of limitation—*Sreenivasachariar v. Ponusamy*, 28 Mad. 40.

The clause contemplates an application to take a step, and not a suit. A suit by a decree-holder for a declaration that the property released from attachment on the claim of a third party is liable to be attached, and an appeal to the High Court from the decision of the Lower Court, are not steps-in-aid of execution—*Raghunandan v. Bhugoo*, 17 Cal. 268. But in *Laxmiram v. Bhalashankar*, 39 Bom. 20, 26 I.C. 262, it was held that an appeal by the decree-holder against an order adjudging the judgment-debtor an insolvent was a step-in-aid of execution. See also *Sheo Ram v. Ram Bharosey*, 26 O.C. 71, A.I.R. 1923 Oudh 9, 69 I.C. 660, where the word 'application' was held to be a comprehensive term so as to include a suit.

The prosecution of an appeal from an order made in the course of a proceeding in execution of a decree cannot be looked upon as an application in accordance with law for execution or to take some step-in-aid of execution—*Nand Kishore v. Sipahu Singh*, 26 All. 608; *Kristo Coomar v. Mahabat Khan*, 5 Cal. 595, *Govinddas v. Ganapatdas*, 47 Bom. 783, 25 Bom. L.R. 518, A.I.R. 1923 Bom. 431, 73 I.C. 1030.

708. Oral application.—The application mentioned in this clause need not be in writing; an oral application will satisfy its requirements—*Trimback v. Kashinath*, 22 Bom. 722; *Mulchand v. Jamanbi*, 27 Bom. L.R. 671, A.I.R. 1925 Bom. 443, 89 I.C. 228; *Maniklal v. Nasia*, 20 Bom. 179; *Mohan Lal v. Kasimuddin*, 47 C.L.J. 362, A.I.R. 1928 Cal. 302, 108 I.C. 588, *Abdul Kadir v. Krishnamalammal*, 38 Mad. 695; *Amar Singh v. Tika*, 3 All. 139; *Surajmal v. Sarjoog*, 2 P.L.J. 5, 38 I.C. 540; *Gulzari Lal v. Ram Bhajan*, 22 O.C. 76; *Narayan v. Balkrishna*, A.I.R. 1923 Nag. 11, 67 I.C. 889; *Krishna Aiyar v. Veetil*, A.I.R. 1922 Mad. 30, 70 I.C. 80, 15 L.W. 14; *Somasundaram v. Ma Shwe*, 7 Rang. 132, 117 I.C. 578, A.I.R. 1929 Rang. 152; *Adimuthu v. Adiappa*, 12 Bur.L.T. 113, 52 I.C. 656, *Ram Lal v. Udit Narain*, 2 Luck. 419, 100 I.C. 309, A.I.R. 1927 Oudh 134. *Contra*—*Masilamani v. Sethuswami*, 41 Mad. 251 (per Aylmer J. at pp. 253, 254, dissenting from 38 Mad. 695).

Thus an oral application to the Court to enter partial satisfaction of the decree is a step-in-aid of execution—*Adimuthu v. Adiappa*, *supra*; an oral application made to the Court to proceed with the sale is one in aid of execution and saves limitation—*Gulzari Lal v. Ram Bhajan*, 22 O.C. 76; an oral application asking the Court to issue a warrant of

attachment and sale of certain property in order that the decretal amount might be satisfied from the sale proceeds is a step-in-aid—*Ram Lal v. Udit Narain* (supra); an oral application for an adjournment of the hearing of a previous execution application, in order to enable the decree-holder to produce an encumbrance certificate in respect of the attached property is a step-in-aid of execution which would save limitation—*Abdul Kadir v. Krishnamalammal*, 38 Mad. 695.

The Madras High Court has further laid down that where the C. P. Code requires a written application for execution, a mere oral application would not be a step-in-aid of execution; and where a written application is filed as required by the Code, an oral application is a mere superfluity, and such superfluous oral application cannot save limitation. In order that the oral application may be effective as a step-in-aid of execution, the application must be one which it is necessary to make in order to get the main relief sought for in the execution petition. It must be of such a nature that if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application, or by reason of the Code or the Rules of practice regarding further acts to be done before the main relief prayed for in the execution application could be granted or enforced—*per Kumaraswami Sastry J. in Masilamani v. Sethuswami*, 41 Mad 251 (255), 41 I.C. 701, 33 M.L.J. 219

709. "Date of final order passed on an application"

—These words have been substituted by the Indian Limitation second Amendment Act (IX of 1927), in place of the words "date of applying." Previously, it was the date of making the previous application for execution or to take some step-in-aid of execution, which gave a fresh starting point of limitation, and not the date on which it was heard and an order passed thereon—*Saratkumari v. Jagat Chandra*, 1 C.W.N. 260; *Thakur Ram v. Katwaru*, 22 All. 358; *Raj Behary v. Kalihar*, 10 C.L.J. 479, 3 I.C. 336; *Trimback v. Kashinath*, 22 Bom 722; *Troilokya v. Jyoti Prokas*, 30 Cal. 761 (770), *Mochai v. Meseruddin*, 13 C.L.J. 26, 9 I.C. 213; *Annapurna v. Dharendra*, 24 C.W.N. 55, I.C. 1; *Bhagwanta v. Zamir Ahmed*, 3 Pat 596, A.I.R. 1924 Pat 576, 78 I.C. 766; nor the last day or any other day on which the application was pending—*Fakir v. Gulam*, 1 All 580 (F.B.). As a result of the Amendment, the period will run from the date of the order passed on the application. This amendment has been made in pursuance of a recommendation of the Civil Justice Committee to extend the period of limitation under this clause. (*Gazette of India*, 1927, Part V, p. 13; *Civil Justice Committee Report*, p. 403).

The Amendment Act came into operation from 1st January 1928, and all application made after that date would be governed by this Act, because the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary. If the petitioner's application for execution had not been barred before the new law came into force, the application made after the Amendment Act would be governed by the

new law—*Kanai Lal v. Purna Chandra*, 34 C.W.N. 733 (734). Thus, where an application for execution was at first made on 24th April 1925 and dismissed on 8th August 1925, and the next application was made on 8th August 1928, held that the new Act applied, and the application was not barred, as it was made within 3 years from the date of the final order passed on the previous application (8th August 1925). The Amendment Act will not disturb vested rights. The Act came in force from 1st January 1928 and on that date the decree-holder was still within time under the old Act. The application made on 8th August 1928 was governed by the Amendment Act, and as no right had vested by 1st January 1928, there was nothing to impede the operation of the Amending Act—*Sapani v. Damodar*, A I R 1930 Pat. 207; *Kanai Lal v. Purna Chandra*, supra. It was further contended in the Patna case that the words "date of final order" referred only to the words "for execution" and not to the words "to take some step-in-aid of execution", for the stage of taking a step-in-aid must necessarily precede the "final order" in the execution case; and it was suggested that the period limited by the amendment is three years from the final order in cases in which no steps-in-aid are taken, and in cases where steps are taken, three years from the last step-in-aid of execution. This contention was overruled, as it was too theoretical and did violence to the plain language of the clause as amended, under which time runs from the date of the final order passed on an application for execution or on an application to take some step-in-aid of execution—*Sapani v. Damodar*, supra.

710. "Proper Court"—An application although it is a step-in-aid of execution will not save limitation unless it is presented to the proper Court—*Penugonda v. Korasika*, 31 M.L.J. 90, 35 I.C. 237.

In Explanation II, "proper Court" has been defined as a Court whose duty it is to execute the decree or order.

When a decree is transferred from one Court to another, the "proper Court" within the meaning of this clause is the Court to which the decree is transferred, until it has made its return to the Court which made the decree; and any application made to the Court which passed the decree would be insufficient to save limitation—*Manorath v. Ambika*, 13 C.W.N. 533 (540), 9 C.L.J. 443, 1 I.C. 57; *Abda Begam v. Mirzaffar*, 20 All. 129; *Maharaja of Bobbili v. Narasaraju*, 39 Mad. 640 P.C. (affirming 37 Mad. 231); *Jnanendra v. Jogindra*, 2 Pat. 247, 74 I.C. 608, A.I.R. 1923 Pat. 384; *Syed Mohd. Shakir v. Jugal Kishore*, 28 O.C. 169, A.I.R. 1925 Oudh 492, 85 I.C. 455. An application for execution made to a Court to which the decree has not been transferred is not an application made to the proper Court—*Jugal Kishori v. Butto Krishto*, 55 Cal. 608, 32 C.W.N. 192 (193), 104 I.C. 668, A.I.R. 1927 Cal. 952. When a decree is transferred from Court A to B, then until the Court B has returned the decree to Court A, any application for a further transfer of the decree to any other Court C must be made to the Court B; if made to Court A, it will be insufficient to save limitation—*Rangaswami v. Sheshappa*, 47 Bom. 56 (64), 24 Bom.L.R. 799, A.I.R. 1922 Bom. 350, 68 I.C. 506. But

the Nagpur Court holds contra in *Govind v. Laxman*, 23 N.L.R. 126, A.I.R. 1928 Nag. 29.

Where a decree passed by the sub-Court of Tanjore was transferred to the district Court for execution, but the decree-holder not having made any application for execution within six months, the District Court returned the decree to the sub-Court (under the Civil Rules of Practice), and then the decree-holder applied to the District Court for execution, when he was informed that the decree had been returned to the original Court, held that this application was not made to the proper Court—*Mir Mahomed Noorulla v. Hasarath*, 51 M.L.J. 554, A.I.R. 1926 Mad 1209, 98 I.C. 455.

If a decree is transferred from one Court to another, an application for substitution of names of the legal representatives of the deceased decree-holder may be made to the latter Court, because that Court has jurisdiction to substitute the names—*Mohan Singh v. Jagat Singh*, 50 All. 621, 109 I.C. 412, A.I.R. 1928 All 299 (300), 26 A.L.J. 417. Where a decree has been transmitted from one Court to another, the notice required to be issued under O 21, r 22 must be issued by the Court to which the decree has been transferred; consequently an application for the issue of such notice if made to the Court which passed the decree, is not an application in accordance with law, as it is not made to the proper Court—*Hazari Lal v. Baidyanath*, 26 C.W.N. 292, A.I.R. 1922 Cal. 3, 63 I.C. 116.

Where the area of the property, over which the Court which passed the decree had local jurisdiction at the time of passing it, by reason of an alteration of the local jurisdiction of the Court, removed to the jurisdiction of another Court at the time of presenting the application for execution, the proper Court for applying for execution within the meaning of this clause is the Court which passed the decree—*Seeni Nandan v. Muthuswami*, 42 Mad. 821 (F.B.), *Jagannath v. Ichharam*, 27 Bom. L.R. 649, A.I.R. 1925 Bom. 414, 89 I.C. 87. The reason of this decision is that "otherwise a decree-holder when he decides to apply for execution, possibly at the last moment, will be bound to stop and enquire whether the limits of the territorial jurisdiction of the Court which passed the decree have been altered, and if so, whether the immoveable property which is the subject of the suit or the place where the cause of action arose is within the limits of the transferred area, on pain of losing his right to execute under this Article if he omits to make these enquiries or comes to a wrong conclusion in making them. This is so unreasonable and involves such hardships to the decree-holder in a country like India with a stringent law of limitation that we should hesitate to impute such an intention to the Legislature"—per Wallis C.J. in 42 Mad. 821 (F.B.). A contrary view was taken in two earlier cases of the Madras High Court—*Penugonda v. Korasika*, 31 M.L.J. 90, 35 I.C. 237 and *Seshadri v. Ananthayee*, 1917 M.W.N. 788, 42 I.C. 671. These two cases are now practically overruled by the Full Bench case cited above.

An application for execution made to the Court which passed the decree can be said to have been made to the proper Court, even though

the presiding officer of the Court at the time of the application may not have pecuniary jurisdiction to try the suit in which the decree was passed—*Ishwari Prasad v. Farkat Hossein*, 2 P.L.J. 113, 39 I.C. 63.

An appeal to the High Court against an order made in an execution-proceeding is not an application to the proper Court for execution, for the High Court is not a Court whose duty it is to execute decrees passed by the lower Courts—*Govinddas v. Ganpatdas*, 47 Bom. 783 (784), A I.R. 1923 Bom. 431, 25 Bom. L.R. 518, 73 I.C. 1030.

A Conciliator appointed under the Deccan Agriculturists' Relief Act is not a Court, and an application for execution made to him does not save limitation—*Manohar v. Gebiapa*, 6 Bom. 31.

An application made to a Criminal Court to restrain the parties from acting contrary to the terms of a decree is not a step-in-aid of execution—*Sadappachari v. Krishnamachari*, 12 Mad. 356 (364).

Transfer of decree from British Court to Native State Court and vice versa.—Where a decree of a British Indian Court is sought to be executed in a Court in a Native State (e.g. Travancore) which is not established or continued under the authority of the Governor-General, the application made by the decree-holder to the Court in the Native State for execution does not give a fresh starting point in computing the period for a subsequent execution of the decree in the British Court, because an application to a Foreign Court is not an application "in accordance with law to the proper Court." The 'proper Court' contemplated by this clause is a Court in British India, and not a Court in a Native State. The expression 'in accordance with law' means in accordance with the law of British India, and cannot be extended to an application made to a Foreign Court to execute a decree of a British Court under powers conferred upon it by the legislative authority of that Foreign State. Moreover, if the decree-holder applies to the British Court for a certified copy of the decree and other necessary papers to be transmitted to the Court in Native State, it is not a step-in-aid of execution, because the execution sought in this case is execution in a Foreign Court and not execution in a British Indian Court. Consequently such an application cannot give a fresh starting point in respect of a subsequent execution of the decree in British Court—*Pierce Leslie v. Perumal*, 40 Mad. 1069 (1079, 1080) (F.B.) (per Wallis C. J.). This view was also taken in an earlier case of the Punjab Chief Court, *Nawab Saadat Ali Khan v. Nawab Ali Khan*, 107 P.R. 1881.

The latter part of the ruling in this Full Bench case (40 Mad. 1069) has been strongly disapproved of in a converse case recently coming up before a Division Bench of the same High Court. In this case a decree had been passed in 1911 by a District Court in Mysore State, and after various fruitless attempts at execution, the decree-holder applied to the Mysore Court in 1916 to transmit the decree to the High Court at Madras for execution. The Mysore Court ordered the decree to be transmitted to the Madras Court in 1919. Thereupon the decree-holder applied in the Madras Court for execution of the decree, and the question arose whether

the application made by the decree-holder in 1916 to the Mysore Court for transmission of the decree to the Madras Court was an application in accordance with law so as to be treated as a step-in-aid of execution. Held that "an application in accordance with law" means an application in accordance with the law of the place where the application is made, i.e., the law of Mysore, in the present case; and as according to the law of Mysore an application to transmit a decree from a Mysore Court to a British Court is a step-in-aid, the application of 1916 must be deemed to be a step-in-aid of execution according to the Limitation Act of British India—*Sreenivasa v. Narayan*, 45 Mad. 1014, 69 I C 932, A I R. 1923 Mad. 72. In this case Schwabe C. J., disapproving of the Madras Full Bench case (40 Mad. 1069) cited above, remarked "The difficulty arises owing to the fact that a converse case of the transmission of papers from this Court to a Native State for the purposes of obtaining the assistance of the Court of that Native State in executing a decree of a Court in this Presidency came up before a Full Bench of this Court in *Pierce Leslie v. Perumal*, 40 Mad 1069, and it was there held that such a step was not step-in-aid of execution. We, therefore, have the anomalous position that in interpreting statutes in identical terms, the Chief Court in Mysore has held that an application to transmit the papers in a Mysore case to this Court is a step-in-aid of execution, while this Court has held that the application to transmit the papers in a Madras case to Travancore is not a step-in-aid of execution. .I do not agree with that decision. It has been strongly disapproved of by a Divisional Bench in *Janardan v Narayan*, 42 Bom. 420. The point has been argued before us, and the inclination of my mind is to agree with the Bombay decision and not with that of the Full Bench of Madras, and if the same point arises again, I should wish to have it reconsidered by a Full Bench" (pp 1019, 1021) See also *Prabhulingappa v Gurunath*, 45 Bom 453 (458), A.I R 1921 Bom. 256, 22 Bom. L.R 1389, 59 I.C. 747, where it has been held that if a decree passed by a Court in a Native State is transferred to a Court in British India, all proceedings taken in the Court which passed the decree must be regarded as having been taken in a "proper court" within the meaning of this clause to save limitation "

The above Madras Full Bench case (40 Mad 1069) has been dissented from in *Janardan v Narayan*, 42 Bom 420 (428, 429) where Beaman J. expressed the view that the rather curiously-worded phrase "step-in-aid of execution" was comprehensive enough to include an application made to the British Indian Court to transfer its decree to a Court in a Native State for execution.

A fortiori, where there is an agreement between the British Government and the Government in a Native State, that they shall execute each other's decrees, an application by the decree-holder to transfer the decree of the British Indian Court to the Court of the Native State for execution, and *vice versa*, is an application in accordance with law to take a step-in-aid of execution—*Janardan v Narayan*, 42 Bom 420 (431), 20

Bom. L.R. 421, 46 I.C. 56; *Fatehchand v. Jitmal*, 53 Bom. 844, 31 Bom. L.R. 1105, A.I.R. 1929 Bom. 418.

711. "In accordance with law":—The expression "in accordance with law" does not mean an application prescribed or required by law. An application would be in accordance with law, even though it is not required by law, provided it does not contravene any express provision of law or conflict with any principle of law. Thus, although the C. P. Code nowhere lays down that an application to bring the legal representatives of a deceased judgment-debtor is a necessary preliminary step to the making of an application for execution of the decree against the deceased's representatives, still such an application is one in accordance with law, because there is nothing in the C. P. Code which prohibits a Court from entertaining such application. Merely because the decree-holder, instead of asking the Court to execute the decree against the legal representatives after service of notice under O. 21, r. 22, asks the Court to first complete the array of parties and thereafter makes an application for execution, he cannot be said to have acted in a manner which does not accord with law—*Ramchandra v. Uka*, 24 N.L.R. 36, 103 I.C. 279, A.I.R. 1927 Nag 308 (309). So also the C. P. Code does not require that the transferee of a decree-holder should make an application for substitution of his name in place of the original decree-holder, but only requires that the transferee should make an application for execution after giving notice to the transferor and the judgment-debtor. Still if the transferee makes an application for recognition as transferee, and the judgment-debtor makes no objection thereto, the application must be taken as one made in accordance with law—*Annamalai v. Ramier*, 31 Mad. 234 (235).

Where the prior application for execution which was barred by time was admitted by the executing Court and execution was ordered to issue thereon, the order though erroneously made was nevertheless valid, unless reversed on appeal, and the application was in accordance with law and a step-in-aid of execution. The judgment-debtor cannot object to a subsequent application for execution on the ground that the previous application was barred by time, the matter being *res judicata*—*Desaiappa v. Dundappa*, 44 Bom 227, 22 Bom. L.R. 76, 55 I.C. 329; *Gulappa v. Erava*, 46 Bom. 269 (271), A.I.R. 1922 Bom. 118, 63 I.C. 844; *Mangal Pershad v. Griyakant*, 8 Cal. 51 (59) (P.C.); *Jago Mahton v. Khirodhar*, 2 Pat. 759, A.I.R. 1924 Pat. 122, 74 I.C. 130; *Lakshmanan v. Kuttayyan*, 24 Mad 669; *Prabhulingappa v. Gurunath*, 45 Bom. 453 (459). But although the matter is *res judicata* between the parties, it is open to a third party to dispute the correctness of the prior adjudication allowing a time-barred application. So, a judgment-debtor who was not a party to a previous application for execution of a decree or to any order made upon it, is not precluded from showing that the said application was barred by limitation and that therefore it was not in accordance with law—*Harendralal v. Shari Lal*, 27 Cal. 210 (213).

Where a decree gives certain relief, and the application for execution

seeks some or all of them, and the Court after going into the merits of the application and considering all the circumstances of the case, comes to the conclusion that the particular relief or reliefs shall not be granted, held that such an application would still be an application in accordance with law provided it meets in substance the requirements of the C. P. Code or any law relating to execution—*Bando v Narsinha*, 37 Bom 42, 17 I.C. 210 (212); *Subramanian v. Ramaswami*, 49 M.L.J. 753, A I R. 1926 Mad. 179, 91 I.C. 11. Where an application asks partly for relief granted by the decree and partly for relief totally outside the decree, the application may be void as to the latter, but all the same it is good in law as to the former, and therefore in "accordance with law"—*Bando v. Narsinha*, (supra)

An application for execution would be in accordance with law, if it is in accordance with the rules of procedure prescribed therefor, and it does not cease to be such an application even though on an adjudication on the merits of the case the court rejects the relief for which it prays—*Gobardhan v. Jang Bahadur*, 1 Luck 569, 3 O.W.N. 749, 98 I C. 33, A.I R. 1926 Oudh 616

Where a decree directs that the decree-holder shall be entitled to a certain relief in a certain event or on a certain condition, and the decree-holder applies for that relief before the happening of that event or before fulfilling that condition, it does not follow that he has applied for a relief which is outside the decree and that therefore the application is not one in accordance with law—*Bando v Narsinha*, (supra); *Nathubhai v. Pranjivan*, 34 Bom 189, 5 I.C. 601. Thus, where a decree ordering partition directs that the plaintiff shall not be entitled to execute (i.e. recover his share) until he has paid the amount of Court fee leviable on his claim, an application for execution unaccompanied with the Court fee is still an application in accordance with law—*Nathubhai v Pranjivan*, 34 Bom 189, 5 I.C. 601.

If a person executes a decree with the permission of the Court—a permission which the Court is expressly authorised to give—it cannot be said that he is not doing so in accordance with law. Thus, where a decree is transferred (really or nominally), and the ostensible transferee executes the decree with the permission of the Court (given after due notice to the judgment-debtor and decree-holder), the proceedings taken and the application on which they are based are in accordance with law as between him and the judgment-debtor, although he is a *benamidar*, and the decree is kept alive—*Balkishen v. Bedmati*, 20 Cal. 388 (394, 395).

An application for execution by some only of the decree-holder's legal representatives, though not purporting to be on behalf of the other representatives, is sufficient to save limitation—*Vasudevpatia v. Narayanapanigrahi*, 1916 M W N 112, 31 I.C. 853

An application for execution by the legal representative of a deceased decree-holder without bringing his name on the record is an application in accordance with law—*Alagirisami v. Venkatachellapathy*, 31 Mad. 77.

Where an application for execution of a decree is made by a person who, at the time of making it, was on the face of the decree the only person entitled to execute it, the application does not cease to be an application in accordance with law merely because it is afterwards decided that that person had no title to execute the decree—*Hari Krishnamurthi v. Suryanarainamurthi*, 43 Mad. 424.

A decree having been obtained against a minor represented in suit by his mother as guardian, the decree-holder erroneously took out execution against the mother personally and not as the guardian of her son. The application was granted and a property belonging to the minor was attached. It was held under the circumstances that the application was one in accordance with law notwithstanding the technical defect therein—*Hari v. Narayan*, 12 Bom. 427.

An application for execution of a decree against a minor represented by his mother, without any application to the Court for an order appointing the mother as guardian *ad item*, is an application in accordance with law—*Keshawasarindra v. Mulukrani*, 4 P.L.J. 35, 48 I.C. 415.

Where a decree granted simple interest, and an application for execution was made in which the interest calculated was compound interest, held that the mere mistake in calculating more interest than what was due did not prevent the application from being one in accordance with law. Although the relief claimed had been exaggerated by the extra amount of interest, it would be competent to the Court to treat the extra interest as a surplusage and to strike it out and then grant relief—*Jamil-unnessa v. Mathura Prosad*, 43 All. 550, A.I.R. 1921 All 208, 19 A.L.J. 509, 63 I.C. 362.

An application to execute a decree was made under a general power-of-attorney from A and B, the decree-holders, on the 19th February 1878; but B had died on the 12th February, and this fact was unknown to the pleader who made an application. It was held that this application was one in accordance with law within the meaning of this clause—*Amirunnessa v. Ashanullah*, 13 C.L.R. 18.

Where a decree is erroneously passed in favour of a firm in the name of an agent, and applications for execution are put in by its other agents not named in the decree, such applications are in accordance with law and sufficient to keep the decree alive—*Lachman v. Patni*, 1 All. 510.

A decree in a redemption suit directed the plaintiff to recover possession of the mortgaged property on payment of a certain amount, but the decree did not fix the time within which the payment was to be made. The decree-holder applied for execution of the decree but the application was dismissed on the ground that he had not paid the decree-amount. In a subsequent application the question arose whether the prior application was in accordance with law. It was held that though the payment of the amount was a condition precedent to the making of an order for the delivery of the property, it was not a condition precedent to the making of an application for a conditional order; and the prior application

for execution of the decree without paying the amount was an application in accordance with law—*Syed Hussain v Rajagopala*, 30 Mad. 28

An application for execution made against persons whose whereabouts are not known is an application in accordance with law—*Mahmud Hosain v. Enayat*, 36 All 482

An application for execution of a decree, which was made while the decree was under attachment and was dismissed on that ground, is an application in accordance with law which would save limitation—*Gopala Menon v. Manavikraman*, 22 M L J 146, 13 I C 179; *Adhar v Lalmohan*, 24 Cal. 778

An application which omits to mention an uncertified payment made out of Court is, notwithstanding such omission, an application in accordance with law—*Marimuthu v Ramaswami*, 10 L W 66, 51 I C 114

An application for execution of a decree against a dead person under the influence of *bona fide* mistake, though that application could not be acted upon, is nevertheless an application in accordance with law and is a step-in-aid of execution—*Bepin v Bibi Zohra*, 35 Cal. 1047 (1049); *Samia v. Chokkalinga*, 17 Mad 76 So also, an application for execution in which owing to a *bona fide* mistake the minor judgment-debtor was described under the guardianship of a dead person, is a step-in-aid of execution—*Puran Mal v. Dilwa*, 4 P L T 54, 72 I.C. 1003, A.I.R 1924 Pat. 333 An application for execution against a wrong person is one in accordance with law, where the decree itself is wrongly passed against that person—*Debi Baksh v. Shambhu Dayal*, 48 All 281, 24 A.L.J 266, A I.R 1926 All. 384, 94 I.C. 877. An application made against persons who are not the legal representatives of the deceased judgment-debtor is valid if the decree-holder *bona fide* believes that they are the legal representatives—*Ganeshwar v. Than Mull*, 8 P.L.T 217, A I.R. 1927 Pat, 92, I C 501; *Balkishen v Bedmati*, 20 Cal 388 (396) In an Allahabad case, however, it has been held that an application for execution of a decree against persons alleged to be the legal representatives of the deceased judgment-debtor is not a good application and cannot save limitation, if those persons are subsequently found not to be the legal representatives of the judgment-debtor—*Gyanendra v Rani Nihalo*, 32 All 404 (409) Where a decree was passed against certain persons as trustees, but they have been removed from the trusteeship after the decree, an execution petition against them will not be invalid as a step-in-aid so long as the decree-holder *bona fide* believes that they are still the proper judgment-debtors—*Parakkat Devaswam v Venkatachalam*, 50 M L J 153, A.I.R 1926 Mad 321, 92 I C 709. But a wrong application made under an ignorance of law is not application in accordance with law. Thus, where the judgment debtor died, and the decree-holder was aware of it, but instead of bringing the legal representative of the deceased judgment-debtor on record, the decree-holder made an application for attachment, assuming that he had a decree *in rem* which he could proceed to execute against the estate without bringing on record the representative of the

is amended within the time fixed by the Court. See O. 21, r. 17 (2). In a recent Madras case, however, it has been said that the words "in accordance with law" occurring in O. 21, r. 17 (2) C. P. Code should not affect the construction of the same words in clause 5 of Art. 182, Limitation Act, and therefore even though the application is defective in not giving certain particulars required by r. 11 of O. 21, and the amendment is not carried out within the time fixed by the Court, it is nevertheless an application in accordance with law within the meaning of Art. 182, clause 5—*Abdul Kharim v. Lakshmanaswami*, 27 L.W. 475, A I R 1928 Mad 440 (441), 112 I.C. 36, following *Kamakshi v. Pichu Ayyar*, 4 L.W. 103, 31 M L J. 561, 35 I C. 876.

If the Court fixes no time under O. 21, r. 17 (1); for amending the material defects, and the defects are rectified after the period of limitation, the application should be held to be time barred—*Saïmulla v. Sainaddi*, 18 C L.J. 538, 22 I.C. 337; and the same result happens if the Court passes the order for amendment at a time when the application has already become time barred—*Bhupendra v. Janeswar*, 7 P.L.T. 350, A.I R 1926 Pat 533 (535), 90 I.C. 761.

Other instances of minor defects :—Where a decree is passed against the estate of a deceased in the hands of the judgment-debtors (the heirs of the deceased), the decree falls under sec. 52, C. P. Code, and O. 21, r. 12 is not applicable, and no inventory is required; in such a case, an application for execution unaccompanied by an inventory is nevertheless a step-in-aid of execution—*Birdichand v. Badesaheb*, 28 Bom.L.R. 1322, A I R. 1927 Bom. 52, 98 I C. 941.

An application which is unverified and is defective in the statement of minor particulars which may be easily gathered from the decree filed therewith, may be regarded as one substantially in accordance with law, if the defects are not calculated to mislead the Court or prejudice the judgment-debtor—*Ramayyan v. Kadir Bacha*, 31 Mad. 68 (70). But in *Raghunatha v Venkatesa*, 26 Mad 101 (103), and unverified application for execution was held to be an application not in accordance with law. An application for execution not signed or verified by the decree-holder but by the pleader who had conducted the original proceedings and who was therefore acquainted with the facts of the case, is an application in accordance with law, as it fulfils the requirements of O. 21, r. 11 (2)—*Hasan v. Ramchandra*, 31 Bom.L.R 355, 117 I C. 526, A.I.R. 1929 Bom 196.

Where the only defect in an application for execution was that the date of a previous application (which date was *not material*) had been wrongly stated therein, but even such trivial defect was amended with a delay of only two days beyond the time allowed by the Court, such application was held to be one substantially in accordance with law so as to give a fresh starting point—*Kalka v. Bisheshar*, 23 All. 162.

Any incorrectness or superfluity as to the relief asked for in the application does not vitiate the application to such an extent as to debar

the application from being treated as a step-in-aid of execution—*Kishore Mal v. Jugdish Narain*, 3 Pat. 42, A.I.R. 1924 Pat. 471, 75 I.C. 312

If the Court applied to for execution is not the Court which passed the decree, the name of the latter Court need not find a place in the application for execution. The omission to mention the name of such Court does not render the application one not in accordance with law—*Vithal v. Gopal Rao*, 5 N.L.R. 8, 1 I.C. 240.

An insufficiently stamped application for execution may suffice to keep the decree alive—*Ramasami v. Seshayyengar*, 6 Mad. 181.

An application for execution of a decree, though not accompanied with a copy of the decree, as required by the Rules of the High Court, is an application in accordance with law, because the defect has reference only to extraneous circumstances—*Ramchandra v. Laxman*, 31 Bom. 163, *Pachiappa v. Poojalu*, 28 Mad. 557.

An application for execution of a decree made by the legal representative of a deceased decree-holder, without the production of succession certificate, is nevertheless one made "in accordance with law"—*Balkrishna v. Wagarsing*, 20 Bom. 76; *Mangal v. Salimullah*, 16 All. 26; *Hafizuddin v. Abdool*, 20 Cal. 755, *Bibi Aisha v. Mahabir*, 6 Pat. 440, A.I.R. 1927 Pat. 324 (325), 104 I.C. 218. It is sufficient if the certificate is produced and tendered in Court at any time before the Court proceeds to pass an order for execution—*Kahan v. Ram Charan*, 18 All. 34.

An application for execution by the assignee of a decree is in accordance with law even though he fails to produce the assignment deed—*Vinayak v. Ananda*, 34 Bom. 68, or though he produces an unregistered assignment deed—*Abdul Majid v. Muhammad Faizulla*, 13 All. 89.

An application for execution would be in accordance with law even though unaccompanied with the Conciliator's certificate as required by sec. 47 of the Dekhan Agriculturist's Relief Act—*Sadasiv v. Narsingrao*, 17 Bom. L.R. 203, 28 I.C. 493. So also, an application for execution of a decree passed against a Taluqdar, although unaccompanied with a certificate of the Managing officer under sec. 29E of the Gujrat Taluqdar's Act, 1888, is an application in accordance with law—*Hargovind v. Naja Sura*, 43 Bom. 44, 20 Bom. L.R. 872, 47 I.C. 726.

Where after a decree was transferred for execution to another Court, the interest of the decree-holder became vested by operation of law in another person, and the latter applied for execution to the Court to which the decree was transferred, without previously obtaining from the Court which passed the decree a certificate authorising him to proceed with the execution, but subsequently produced such certificate, it was held that the certificate would relate back to the time when the rights under the decree became vested in the applicant, and the application was made to the proper Court in accordance with law—*Manorath v. Ambika*, 13 C.W.N. 533 (537), 1 I.C. 57.

An application for execution of a decree made by one member of a firm which has obtained a decree, is no doubt defective, but it is still an

83 (85); *Nilmoney v. Ram Jeebun*, 8 C.L.R. 335. If the prior application, which was made in a Native State, was time barred according to the law of limitation in British India (being made more than 3 years after the date of the decree) though it was not time-barred according to the law of the Native State, it is incapable of saving limitation, and the execution of the decree is barred—*Nabibhai v. Dayabhai*, 40 Bom. 504 (508), 18 Bom L.R. 481, 36 I.C. 369.

The expression "applying in accordance with law" means applying to the Court to do something in execution which by law that Court is competent to do. It does not mean applying to the Court to do something which either to the decree-holder's direct knowledge in fact, or to his presumed knowledge of the law, the Court was incompetent to do—*Purna Chandra v. Radha Nath*, 33 Cal 867; *Chatter v. Newal*, 12 All. 64, *Stevens v. Kamta*, 10 C.L.J. 19, 2 I.C. 941; *Munawar v. Jani Bilal*, 27 All 619; *Langtu v. Baijanth*, 28 All. 387 (389); *Khet Singh v. Onkar Seth*, 1 N.L.R. 61. Therefore, an application for execution made to a Court which has no jurisdiction to entertain it (e.g., an application to execute a Small Cause Court decree made to a Court having no small cause powers, without the decree being transferred to such Court), is not an application in accordance with law—*Ram Raj v. Umraji*, A I R 1926 All. 345, 93 I.C. 292. An application to have the judgment-debtor arrested in contravention of the terms of sec. 341, Civil Procedure Code (1882), and an application to bring the mortgaged property to sale in contravention of sec. 99 of the Transfer of Property Act are not applications in accordance with law within the meaning of the clause—*Chatter v. Newal*, 12 All. 64. Where the judgment-debtor has applied for declaration of insolvency, and proceedings in insolvency are pending on his application, no application for execution can be made by the decree-holder against the judgment-debtor or his surety. Therefore an application made against the surety under such circumstances will not be an application in accordance with law—*Langtu v. Baijanth*, 28 All. 387 (389).

An application to transfer a decree to a Court which is pecuniarily incompetent to execute the decree is not an application in accordance with law—*Amrit Lal v. Murlidhar*, 1 Pat 651 (653), 3 P.L.T. 422, 67 I.C. 538, A.I.R. 1922 Pat. 188. Similarly, an application for execution of a decree by attachment of property beyond the local jurisdiction of the executing Court is not one in accordance with law—*Sheo Prasad v. Narain*, 48 All. 468, A I R 1926 All. 95, 90 I.C. 938.

Where a decree directs that the plaintiff should be maintained in possession of a share of a village by cancelment of the order of the settlement officer directing the entry of the defendant's name in respect of such share in the revenue registers, the Court executing the decree should not issue an order to the Collector to amend the entry in such register, but must simply forward a copy of the decree for his information. Therefore, an application for execution, which prays the Court executing the decree to order the Collector to amend such entry in the revenue record, instead of asking it to send such officer a copy of the decree for his

information for the purpose of amendment, is not an application in accordance with law—*Muhammad Umar v. Kamila Bibi*, 4 All. 34.

The application for execution contemplated in this clause must be one made in accordance with law and asking to obtain some relief given by the decree and to obtain it in the mode that the law permits. If the application asked for a relief which the decree did not give, or execution was asked for in a way different from that provided by the decree, it was not an application in accordance with law to execute or further the execution of the decree—*Pandarinath v. Lilachand*, 13 Bom. 237; *Bando v. Narsinha*, 37 Bom. 42, 17 I.C. 210 (212); *Nathubhai v. Pranjivan*, 34 Bom. 189; *Sri Ram v. Majiduddin*, 98 P.R. 1901. Thus, where an instalment decree did not provide that in default of payment of an instalment the whole amount would become due, but on the judgment-debtor making default the decree holder applied for execution of the whole decree, held that the application, not being in accordance with the terms of the decree, was not one in accordance with law—*Jayanuddin v. Jamiluddin*, 21 C.W.N. 835, 37 I.C. 916. Where the decree-holder asked in his application that he might be put in possession of a certain house, while the decree did not provide for such thing, held that the application was not in accordance with law nor one to take a step-in-aid of execution as it asked for a relief outside the decree altogether—*Pandarinath v. Lila Chand*, 13 Bom. 237. Where the decree directed payment of a money out of the mortgaged property, an application to recover the money from the other properties of the judgment debtor, was not an application in accordance with law—*Sri Ram v. Majiduddin*, 98 P.R. 1901.

Where an application for execution is forbidden by any special enactment, it is not an application according to law—*Chatim Kushalchand v. Mohadu Bhagaji*, 10 Bom. 91.

An application for execution which omits to mention a previous application for execution, as required by O. 21, r 11 (f) is materially defective, and is not an application in accordance with law—*Sahigram v. Tower*, 15 S.L.R. 156, A.I.R. 1922 Sind 29, 65 I.C. 14.

An application made by a benamidar for execution of a decree and for substitution of his name as decree-holder is not an application made in accordance with law within the terms of this Article—*Gour Sundar v. Hem Chander*, 16 Cal. 355; *Denonath v. Lalit*, 9 Cal. 633.

An application made by the pleader of the decree-holder after the decree-holder's death has not the effect of saving limitation, as the authority of the pleader ceases on the death of his client—*Kallu v. Muhammad Abdul* 7 All. 564.

An application for partial execution of a decree is not "in accordance with law." But a judgment-debtor who did not appeal against a previous order for execution of a portion of the decree and who did not dispute the validity of such order, cannot, in the matter of a subsequent application for execution of the remaining portion of the decree, contend that the first application was not "in accordance with law"—*Dali Chand v.*

Bai Shivkor, 15 Bom. 242, *Babagowda v. Tanibal*, 76 I.C. 1041, A.I.R. 1924 Bom. 112; *Nanda v. Raghunandan*, 7 All. 282, *Nepal Chandra v. Amrita Lal*, 26 Cal. 888.

If the decree-holder himself resides within the local limits of the jurisdiction of the Court, an application by a person holding a general power-of-attorney from the decree-holder is not in accordance with law, with reference to secs. 36 and 37 of the C. P. Code (1882)—*Murari v. Umrao*, 23 All 499, *Kasumri v Beni*, 26 All 19.

An application for execution made by a guardian for the decree-holder who is described as a minor but is found to be a major at the time, is not in accordance with law—*Saramma v. Seshayya*, 28 Mad. 396

Where the plaintiff assigned his rights to another person pending the suit, and a decree was passed in favour of the assignor, but the assignee applied for execution of the decree, held that the execution application was not one in accordance with law, as there was no assignment of the decree under O. 21, r. 16 C. P. Code after the decree was passed, nor did the applicant apply to the court under O 22, r. 10 to be made a party to the suit and get a decree passed in his favour—*Genaram v. Hanmantram*, 28 Bom L.R. 761, 96 I.C. 833, A.I.R 1926 Bom. 406.

714. Step-in-aid of execution—Clause 5 of Art 182 contemplates an application in accordance with law to the proper Court, asking the Court to do one of two things, either to execute, or to take some step-in-aid of execution—*Murgeppa v Basawantrao*, 37 Bom 559, 15 Bom L.R. 557, 20 I C 252.

To take some step-in-aid means to obtain an order of the Court in furtherance of the execution of the decree—*Troilokya v. Jyoti*, 30 Cal 761; *Umesh v Soonder*, 16 Cal 747. After having set the Court in motion to execute a decree, any further application during the continuance of the same proceeding is an application asking the Court to take some step-in-aid of execution—*Chowdhury Poroosh v. Kali Puddo*, 17 Cal. 53, *Sujan v. Hira*, 12 All 399 (F.B).

An application would keep the decree in force even though it is *not made in good faith*. There is no necessity to inquire whether the proceedings were taken for the purpose of enforcing the decree or were merely colourable for the purpose of keeping the decree alive—*Rohinee v Bhagwan*, 22 W R 154, *Eshan v. Prannath*, 22 W.R. 512 (F.B). The Court has simply to consider whether the application was made in conformity with the procedure laid down and whether it was made to the proper Court, and not to import considerations derived from the conduct of the decree-holder. The question of *bona fides* has no application to such cases—*Hatima v. Nishan*, 1890 A W N 77; *Debi Das v. Umrao*, 1891 A.W N. 148. An application would be in accordance with law, even though it is not made in good faith, i.e. even though the applicant does not really wish to obtain the execution for which he has asked. The *mala fides* may stand in the way of a litigant being granted relief, but it would not render the application an application not in accordance with law. Where the decree-holder makes his application to

the proper Court in proper form, and demands the remedy to which he is entitled, his intention is immaterial—*Rugya v. Prag Tewari*, 3 Luck. 580, 5 O.W.N. 353, 110 I.C. 704, A.I.R. 1928 Oudh 337 (338) dissenting from 48 All. 468). In a recent Allahabad case it was remarked that, the words 'for execution' and 'step-in-aid of execution' meant that the decree-holder must really be desiring execution; that is, there must be a *bona fide* intention on the part of the decreeholder to proceed with his right to have execution. A colourable application made with the sole object of extending the period of limitation would not be a step-in-aid of execution. The legislature did not contemplate an indefinite period being added to the life of a decree by permitting a decreeholder to take colourable steps in a very thinly disguised pretence of a desire to obtain execution when he really did not want execution at all but only wanted to secure a further period of limitation during which the amount of his decree might go on increasing—*Sheo Prosad v. Naraini*, 48 All. 468, A.I.R. 1926 All. 95, 24 A.L.J. 137, 90 I.C. 938. But in a very recent case the Full Bench of the same High Court has laid down that for the purposes of this Article it is sufficient to show that an application was made in accordance with law to the proper Court for execution or to take some step-in-aid of execution. It is not necessary to show that such application had been made with a *bona fide intention* to execute the decree or to take such step, and not merely to keep it alive. It is not proper for the execution Court to hold any inquiry as to the intention with which the application might have been filed. It is wrong to read in this clause requirements of good faith and due diligence—*Kayastha Co. Ltd. v. Sita Ram*, 52 All. 11 (F.B.), 27 A.L.J. 982, 118 I.C. 17, A.I.R. 1929 All. 625 (631, 650). The Full Bench did not overrule the case of 48 All. 468, but distinguished it on the ground that the ruling in that case was applicable to its particular facts, because the application was not in accordance with law as it was made to a Court which had no jurisdiction to attach the property, and so the Judges questioned the *bona fides* of the decree-holder.

An application, in order to be a step-in-aid of execution, must be made in the course of a *pending* execution proceeding. The words 'step-in-aid of execution' appear to be intended to cover an application which is not an initial application for execution but is an application to take some step to advance an execution proceeding which is already *pending*. If the prior application was made at a time when no execution proceeding had been initiated, the application was not a step-in-aid of execution—*Kuppusami v. Rajagopala*, 45 Mad. 466 (471), A.I.R. 1922 Mad 79, 42 M.L.J. 303, 70 I.C. 324; *Sankara v. Thanganna*, 45 Mad. 202 (205) (Per Ayling J.); *Balagurusami v. Gurusami*, 48 M.L.J. 506, A.I.R. 1925 Mad. 703, 87 I.C. 989. In some other Madras cases it has been held that an application in order to be a step need not be made in a *pending* execution—*Kannan v. Arvulla*, 50 Mad 403, 52 M.L.J. 1, A.I.R. 1927 Mad. 288 (291), 99 I.C. 677; *Sankara v. Thanganna*, 45 Mad. 202 (per Ramesam J.); *Krishna v. Seetharam*, 50 Mad. 49, A.I.R. 1926 Mad 1178 (1180), 93 I.C. 156 (obiter).

But the Patna High Court is of opinion that Art. 182 clause 5 does not require that the application to take some step-in-aid of execution of the decree should be made in the course of execution proceedings; the application may be made in any other proceeding which may not, strictly speaking, be proceeding in execution but which affects the execution of the decree—*Jagdeo v. Bhubaneswari*, 7 Pat. 708, 9 P.L.T. 817, A.I.R. 1928 Pat. 612 (613), 113 I.C. 582. Any step taken by the decree-holder to remove an obstacle thrown by the judgment-debtor in the way of the execution of the decree is a step in aid of execution. It is not necessary that the step must be taken in the execution proceedings; the step may be taken in any proceeding which has the effect of throwing an obstacle to the execution of the decree—*Sheo Sahay v. Jamuna*, 4 Pat 202, 6 P.L.T. 777, 88 I.C. 807, A.I.R. 1925 Pat. 459. Therefore the decree-holder's act of filing a list of the witnesses in a proceeding held at the instance of the judgment-debtor to set aside the sale, is a step-in-aid, in as much as the proceeding to set aside the sale threw an obstacle in the way of the decree-holder's taking out execution, though there was no execution proceeding pending at that time—*Jagdeo v. Bhubaneswari*, *supra*.

The step must be taken to "aid" i.e. to advance the execution proceeding. That is, the application contemplated by this clause is one to obtain some order of the Court in furtherance of the execution of the decree. The mere appearance of the decree-holder or his pleader to oppose the proceedings taken by the judgment-debtor to set aside the execution sale cannot properly be regarded as an application to take some step-in-aid of execution, because the execution of the decree is not further advanced than it was before the appearance of the pleader—*Umesh Chander v. Soonder Narain*, 16 Cal 747. So also, where a judgment-debtor filed a petition for entering satisfaction of the decree which he claimed to have discharged, and the decree-holder filed a counter-statement denying receipt of the decretal amount and asking that the petition should be dismissed, such counter-statement did not amount to a step-in-aid of execution. The counter-petition may tend to prevent the Court placing an obstacle in the way of future execution of the decree, but it does not ask the Court to take any step-in-aid of execution. for the execution of the decree is no further advanced than it was before the counter-petition was presented—*Kuppuswami v. Rajagopala*, 45 Mad 466 (470), 42 M.L.J. 303, 70 I.C. 324, A.I.R. 1922 Mad. 79, *Krishna Pattar v. Seetharama*, 50 Mad 49, 51 M.L.J. 480, 98 I.C. 456, A.I.R. 1926 Mad 1178. Where an execution petition was returned by the Court for being re-presented with the sale papers and encumbrance certificate, and the petition was re-presented without the papers, but with a request, in the petition, for extension of time for obtaining the necessary papers, held that the request for extension of time could not be deemed a step-in-aid of execution, because the execution was not advanced by it in any way—*Katifi Mahomed v. Ghouse*, 51 M.L.J. 489, A.I.R. 1926 Mad. 1197, 98 I.C. 763.

In order to be a step-in-aid of execution, it is not necessary that the

prior application for execution must have been a *successful* one. Where an application for execution was duly made in accordance with the terms of this clause, the mere fact that the application was dismissed does not prevent it from furnishing a fresh starting point for limitation—*Adhar Chandra v. Lal Mohan*, 24 Cal. 778; *Narsingh v. Charan*, 14 C.W.N. 486, 5 I.C. 147, *Shankar v. Narsingrao*, 11 467; *Gulappa v. Erava*, 46 Bom. 269, A.I.R. 1922 Bom 118, 63 I.C. 526. The application under O. XXI, rule 22 of the C. P. Code for execution of a decree with a prayer for substitution of the legal representatives of a deceased judgment-debtor is a step-in-aid of execution, though eventually dismissed for non-payment of process-fees—*Aptabud Jogendra*, 31 C.L.J. 389, 55 I.C. 231.

As to an application which is *withdrawn* by the decree-holder on account of some formal defects in it, it was once held that such an application could not afford a new starting point for limitation—*Sarju Prasad v. Sita Ram*, 10 All. 71; *Ksfayat Ali v. Ram Singh*, 7 All. 359; *Radha v. Man Singh*, 12 All. 392; *Pirjade v. Pirjade*, 6 Bom. 681. These were decided by applying the principle of sec. 374 C. P. Code (O. 23, rule 2 of the present Code) to execution proceedings. The section laid down that if a suit was withdrawn and a fresh suit instituted, the plaintiff would be bound by the law of limitation in the same manner as if the first suit had not been instituted. On the analogy of this it was held in the above cases, that the question of limitation in reference to a subsequent application for execution of a decree must be determined on the supposition that the previous application (which had been withdrawn) had not been made. But the authority of the above cases has been shaken by the Privy Council decision in *Thakur v. Fakirullah*, 17 All. 106 (P.C.) and by the enactment of sec. 374 C. P. Code 1882 (O. 23, rule 4, C. P. Code 1908) which expressly lays down that the provisions relating to the withdrawal of suits shall apply to execution proceedings. From this it follows that a prior application for execution which is withdrawn by the decreeholder will no longer be considered as non-existent but will help to keep the application alive, and will act as a step-in-aid of execution with respect to a subsequent application. See *Muzaraf v. Amir*, 15 C.W.N. 71, 8 I.C. 83.

But an application to withdraw a prior execution application does not amount to a step-in-aid of execution. It is simply an application for further time to proceed with the pending execution proceedings; and the mere granting of further time to make a subsequent application cannot be said to be a step, as the taking of it does not prevent the Court in executing the decree or advance the execution proceedings in any way—*Tarak Chander v. Gyanada Sundari*, 23 Cal. 817 (dissenting from *Ram Narain v. Bukhtu Kuar*, 16 All. 75).

The step-in-aid of execution has to be taken not by the applicant but by the Court. An application by the legal representative of a dec

decree-holder for a succession certificate is a mere preparation or preliminary to the execution of a decree, and is not an application asking the Court to take some step-in-aid of execution—*Murgeppa v. Basawantrao*, 37 Bom. 559, 15 Bom.L.R. 557, 20 I.C. 252.

But the step has to be taken by the Court at the instance of the decree-holder. The mere act of the Court confirming a sale in execution, which act is not shown to have been performed upon any application of the decree-holder, is not a step—*Motendra v. Mohendra*, 10 C.L.R. 330. In the absence of any allegation and any evidence to the effect that an application to take some step-in-aid of execution was made by the decree-holder, a mere order by the Court in the order-sheet that the decreeholder should take the necessary steps will not bring the application for execution within time—*Kara Pasi v. Ram Nath*, 8 P.L.T. 670, A.I.R. 1927 Pat 323, 103 I.C. 37.

Again, there must be an application to the Court to take some step-in-aid of execution, the mere act of the decree-holders' taking a step-in-aid will not keep the decree alive. For instance, the mere payment by the decree-holder of Nazir's fee for the issue of sale proclamation, unless accompanied with an application, will not extend the time—*Madan v. Ganga*, 17 C.L.J. 422, 13 I.C. 189 (dissenting from *Radha Prasad v. Sundar Lal*, 9 Cal. 644, 646); and the mere fact that the payment was made pursuant to an order of the Court on a previous application is not sufficient—*Ibid*.

Two things are essential there must be an application, and that application must ask the Court to take a step-in-aid of execution. The fact that a party took some steps would not be enough—*Rangachariar v. Subramania*, 12 L.W. 9, 59 I.C. 536. Before a judgment-creditor can get any benefit, he must show that he asks the Court to take some step-in-aid of execution. A step taken by the judgment-creditor himself is not sufficient—*Raghunundun v. Kallydut*, 23 Cal 690 (692).

In deciding whether any particular act is or is not an application for, or a step-in-aid of, execution, it is the nature of the act that must be looked to, and not the time at which it may be possible to do it—*Koormayya v. Krishnamma*, 17 Mad 165.

715. Step, what is—The decided cases on the subject of step-in-aid of execution reveal an extreme conflict of view; they fail to disclose even a principle of general or uniform application. The wording is so uncertain that it leads to the spending of efforts in barren and fruitless discussion, and a good deal of time of the Court is wasted. Such a large body of case-law has now grown up on the point that the legislature may well with the aid of the decided cases catalogue the applications which in its opinion ought to serve as steps-in-aid of execution. This is a suggestion which I venture to make with a view to make the law more certain—*per Venkatasubba Rao J.* in *Vappa v. Srida Lakshmi*, 53 Mad 390, 58 M.L.J. 406, A.I.R. 1930 Mad. 558 (1930) 123 I.C. 577.

An application by a judgment-creditor to bring an execution case on the file, and to record his certificate of the payment of a sum of money by the judgment-debtor, is a step-in-aid of execution—*Tarinidas v. Bistoolal*, 12 Cal. 608.

An application by the decree-holder praying that the judgment-debtor's property be sold subject to a mortgage of a claimant-mortgagee was held to be a step-in-aid of execution—*Lalraddi Mullick v. Kala Chand Bera*, 15 Cal. 363.

Where the original decree-holder being dead, his son applied to be brought on the record and to have money levied and paid, such an application was a step-in-aid of execution—*Govind v. Appaya*, 5 Bom. 246; *Keshavlal v. Pitambardas*, 19 Bom. 261; so also is an application to the Court to issue notice under sec. 248 C. P. Code to the heir of the deceased judgment-debtor and to require him to adjust the account—*Ibid*; *Gopal v. Gosain*, 25 Cal. 594 (F.B.).

An application by a decree-holder to execute a decree belonging to his judgment-debtor and attached in execution of his own decree is a step-in-aid of execution of the latter decree and has the effect of keeping it alive—*Lachman v. Thondi Ram*, 7 All. 382, *Adhar v. Lalmohan*, 24 Cal. 778, *Gya Loan Office v. Dhirit*, 8 I.C. 675.

An application made by a judgment-debtor stating that he had come to an adjustment of the decree with the decree-holder and praying that the execution case might be struck off, has been held to be a step-in-aid of execution—*Ghansham v. Mukha*, 3 All. 320.

An application by a judgment-debtor to the Court which passed the decree for a certificate that a copy of a Revenue Register of the land is necessary as a preliminary to the execution of the decree by attaching the land, is a step-in-aid of execution—*Kunhi v. Sheshagiri*, 5 Mad. 141.

Where the decree-holder made an application to the executing Court that the original records of the case should be sent for as they were necessary in order to get rid of the objections raised by the judgment-debtor, and the executing Court sent for the record, held that the application was a step-in-aid of execution—*Raghunath v. Lachmi Narain*, 47 All. 667, 23 A.L.J. 422, A I R. 1925 All. 394, 88 I.C. 271.

An application by a decree-holder to the Court to which a decree has been transferred for execution, to return the decree (which has been partially executed) to the Court which passed it, for further execution, is a step-in-aid of execution—*Krishnayyar v. Venkayyar*, 6 Mad. 81. But an application by a decree-holder to the Court to which the decree had been transferred to give the partially executed decree to him is not a step-in-aid of execution—*Aghore Kali v. Prosonno*, 22 Cal. 827.

An application for execution of a mortgage-decree for sale, wrongly returned for want of a certificate under section 238 of the Civil Procedure Code, although not re-presented, is a step-in-aid of execution—*Mootha v. Kandam Sankunni*, 27 I.C. 811.

and to serve notice on him of the substitution-application is also a step-in-aid of execution—*Ibid.* A decree passed by one Court was transferred to another Court for execution. The decree-holder assigned the debt to another person. The assignee applied to the latter Court asking the records be sent back to the Court which passed the decree, in order that he might be recognised as the assignee of the decree. *Held* the application was a step-in-aid of execution, for his claim as assignee could be recognised only by the Court which passed the decree, and for that purpose it was necessary to send back the records to that Court. *Co Ayjaru v Varadaraja*, 50 M.L.J. 116, A.I.R. 1926 Mad. 431, 92 I.C. An application by the judgment-creditor for substitution of the heir of the deceased judgment-debtor is a step-in-aid of execution—*Adhulal Mohun*, 24 Cal 778, *Saday Chandra v. Paresh Nath*, 35 C.L.J. A.I.R. 1922 Cal 44, 64 I.C. 571, *Ramchandra v. Uka*, 24 N.L.R. A.I.R. 1927 Nag. 308 (310); even though it contains errors in the nature of proper reliefs and is therefore not strictly in accordance with the law still it is a step-in-aid—*Varadiati v. Kumara Venkata*, 26 M.L.J. 81, I.C. 782.

An application by the transferee of a decree to bring in the representatives of a deceased defendant is a step-in-aid of execution though the applicant himself has not been recognised as the transferee of the decree-holder—*Mahalinga v. Kuppanachariar*, 30 Mad. 541.

For payment—An application by the judgment-creditor for payment of a fund or money attached is a step-in-aid of execution, if the money of which payment is sought has not been already realised in execution as the result of the attachment—*Apurba v. Chundermoney*, C.W.N. 354. But if the money has been realised and is lying in Court an application for the payment of the money is an application for a ministerial order and does not amount to a step-in-aid of execution. See *Fazal Imam v. Metta Singh*, 10 Cal. 549; *Hem Chunder v. Soondery*, 8 Cal. 89, and other cases (as well as contrary rulings) in Note 716 (subheading "To take out money") at p. 805 *infra*.

For payment towards decree out of money deposited:—Where money is deposited in Court as security for the costs of the suit, an order of Court is necessary to make it available for payment towards the debt amount, and an application for such order is a step-in-aid of execution—*Thangi v. Durga Shetti*, 35 M.L.J. 575, 48 I.C. 226.

For rateable distribution:—An application for rateable distribution is one to take a step-in-aid of execution—*Gobardhan v. Jang Bahadur*, O.W.N. 749, 1 Luck. 569, A.I.R. 1926 Oudh 616, 98 I.C. 33. Where such an application was made and distribution was granted without fixing the amounts, another application was made for an order to be made for the money so ordered to be distributed, it was held that the second application was also a step-in-aid of execution—*Bajinath v. Ghanash*, 8 C.W.N. 382. But if the order granting the application for rateable distribution also stated the precise amounts to be paid to the debt holders, an application for an order of withdrawal of the amounts

one for a mere ministerial order and was not a step-in-aid of execution—*Sadananda v. Kalishanker*, 10 C.W.N. 28.

For issue of notice:—An application by the decree-holder under sec. 248 C. P. Code of 1882 (O. 21, rule 22 of the Code of 1909) for the issue of a notice to the judgment-debtor, should be regarded as a step-in-aid of execution—*Ramchandra v. Krishna Lal*, 1 Pat. 328, A I R 1922 Pat. 301, 65 I.C. 332, *Jogendra v. Mangal Prasad*, 7 P.L.T. 330, 60 I.C. 847, A.I.R. 1926 Pat. 160, *Gobardhan v. Satischandra*, 1 Pat. 609, A.I.R. 1922 Pat. 597, 69 I.C. 668; *Pachiappa v. Poojali*, 28 Mad. 557; *Ramakshi v. Ramaswami*, 18 M.L.J. 14, *Gownd v. Appayya*, 5 Bom. 246; *Gopal Chandra v. Gosain*, 25 Cal. 594 (599) (F.B.), *Behari v. Salik Rari*, 1 All. 675, *Mid. Nawaz Khan v. Ram Das*, 22 P.R. 1905, *Shankar v. Zorawar*, 116 P.R. 1907; *Saday Chandra v. Paresh*, 35 C.L.J. 82, A.I.R. 1922 Cal. 44, 64 I.C. 571, *Keshav Lal v. Pitamber Das*, 19 Bom. 261. In some cases it has been held that a mere service of notice would not save the application from limitation unless there was some other proceeding in relation to the execution of the decree after the service of the notice—*Bishwambhar v. Mahesh*, 6 Pat. 277, A.I.R. 1927 Pat. 218, 103 I.C. 39, *Sripati Charan v. Belchambers*, 15 C.W.N. 661, 8 I.C. 22, *Umed Ali v. Abdul Karim*, 35 Cal. 1060. Where an order was made for attachment of the judgment-debtor's properties after the service of notice under O. 21, r. 22, this would save a subsequent application for execution from the bar of limitation—*Bishwambhar v. Mahesh* (supra).

A batta memorandum which mentions that batta is paid for the issue of notice to the judgment-debtor under section 248 C P Code (1882) is an application to take a step-in-aid of execution—*Alagamuthu v. Deva-sagaya*, 1916 M.W.N. 78, 3 L.W. 34, 32 I.C. 484.

Where a decree has been transmitted from one Court to another, the notice required under O. 21, r. 22 to be served on the judgment-debtor must be issued by the Court to which the decree has been sent, in such a case an application made to the Court which passed the decree, for issue of the notice, is not a step-in-aid of execution—*Hazari Lal v. Baidya Nath*, 26 C.W.N. 292, A I R 1922 Cal. 3, 63 I.C. 116.

Filing affidavit of service of process—According to the Patna High Court, the filing of an affidavit in proof of service of a process of attachment is a step-in-aid of execution—*Thakur v. Sheo Bhan*, 4 P.L.J. 521, 49 I.C. 892. So also, in some Calcutta cases it has been held that the filing of an affidavit of the service of notice on the judgment-debtor (under O. 21, r. 22) is equivalent to a step-in-aid—*Mohan Lal v. Kasi-muddin*, 47 C.L.J. 362, A I R 1928 Cal. 302, 108 I.C. 588, *Pran Krishna v. Pratap*, 21 C.W.N. 423, 38 I.C. 536. But a contrary view has been taken in another Calcutta case—*Krishna Prasad v. Dharendra*, 24 C.W.N. 55, 30 C.L.J. 518, 54 I.C. 1. The Bombay High Court is of opinion that the filing of such affidavit does not amount to a step—*Mohan v. Bapuji*, 11 Bom.L.R. 729, 3 I.C. 771. In a recent Patna case it has been held that where the decree-holder was ordered to file written pro-

cesses as well as the identifier's affidavit as to service of notice under O. 21, r. 22, but he filed only the identifier's affidavit but not the written processes, and did not even give any explanation for his failure to do so, and accordingly the Court dismissed the execution case for default, held that the mere filing of the affidavit did not in the circumstances of this particular case amount to a step-in-aid of execution—*Fateh Bahadur v. Parmeshwar*, 6 Pat. 694, 9 P.L.T. 833, A.I.R. 1928 Pat. 145 (146), 108 I.C. 430 (distinguishing 4 P.L.J. 521).

For time :—An application asking for time to enable the applicant to adduce evidence of due service of notice under section 248 C. P. Code is a step-in-aid of execution—*Narasingh v. Kalicharan*, 14 C.W.N. 486, 5 I.C. 147. So also, an application asking for extension of time for the purpose of ascertaining the whereabouts of the judgment-debtor—*Bhairan v. Amina*, 38 All. 690; or an application by the decree-holder for time to enable him to ascertain the share of the judgment-debtor in the property put up for sale—*Vishvanath v. Narsu*, 23 Bom.L.R. 107, A.I.R. 1921 Bom. 33, 60 I.C. 916; or an application for time to obtain copies of extracts required by section 238 C. P. Code—*Seshadasacharya v. Bhimacharya*, 37 Bom. 317, 17 I.C. 969, or an application asking for time to enable the applicant to obtain copies of decree and judgment, made after presenting a darkhast to execute a decree—*Haridas v. Vithaldas*, 36 Bom 638; so also, an application by the mortgagor, who has obtained a redemption-decree, for an extension of time for depositing the redemption money in Court—*Sankara v. Thangamma*, 45 Mad. 202, A.I.R. 1922 Mad 247, 70 I.C. 333. But an application for extension of time to enable the decree-holder to file an encumbrance certificate does not amount to a step-in-aid of execution because it does not ask the Court to take any step in furtherance of the execution of the decree—*Ramaswami v. Veeranna*, 53 M.L.J. 766, A.I.R. 1928 Mad. 143, 106 I.C. 648; *Katiff Mahomed v. Ghose*, 51 M.L.J. 489, A.I.R. 1926 Mad. 1197, 98 I.C. 163. In an earlier Madras case, however, such an application was considered as a step-in-aid of execution—*Abdul Kadir v. Krishnan*, 38 Mad. 695, 26 M.L.J. 433, 23 I.C. 533.

For attachment :—An application asking for attachment of the properties of the judgment-debtor is a step-in-aid of execution. Consequently, a batta application which states that batta is paid to attach the properties of the judgment-debtor is a step-in-aid—*Govindaswami v. Govinda*, 45 M.L.J. 678, 89 I.C. 894, A.I.R. 1925 Mad. 880.

To issue sale proclamation—To deposit process fee :—An application to a Court to issue a sale proclamation is a step-in-aid of execution—*Ambica Pershad Singh v. Sardhari Lal*, 10 Cal. 851 (F.B.); *Chowdhry Parsooth Ram Das v. Kali Paddo Banerjee*, 17 Cal. 53; *Manek Lal v. Nasia*, 15 Bom. 405; *Rajkishore v. Gurcharan*, 9 I.C. 634; *Vijayaraghavalu v. Srinivasulu*, 28 Mad. 399. But the mere payment of stamps or process-fee unless accompanied by an application to issue the sale proclamation, will not keep the decree alive—*Vellaya v. Jagannatha*, 7 Mad. 307; *Thakur Ram v. Katwaru*, 22 All. 358; *Sheo Prasad v. Indar*, 30 All. 179.

(180); *Malakchand v. Bechar Natha*, 25 Bom. 630 (F.B.), *Trimbak v. Kashinath*, 22 Bom 722, *Toree Mohamed v. Md. Mahood*, 9 Cal. 730 (731); *Arunchalam v. Latchumanan*, 47 M L J. 537, 82 I.C. 497, A.I.R. 1924 Mad. 906; *Bhawani v. Syid Iftikhar*, 7 I.C. 759; *Modan Mohan v. Gangs Charan*, 17 C.L.J. 422, 13 I.C. 189 (dissenting from *Radha Prasad v. Sandar Lal*, 9 Cal. 644, 646), *Peoples' Industrial Bank v. Mahesh Charan*, 1 Luck. 153, A.I.R. 1926 Oudh 289, 93 I.C. 631. So also, the deposit of additional Court-fee for service of a notice under sec. 248 of the Civil Procedure Code, 1882, is not a step-in-aid of execution when the deposit was made *after* the application to the Court and the step taken by it, and where it did not appear that any application for execution or to take a step-in-aid was made at the time when the additional Court-fee was paid—*Dwarkanath v. Anandrao*, 20 Bom 179. In *Narendra v. Bhupendra*, 23 Cal 374 (387) and *Bhupendra v. Rajendra*, 18 I.C. 455, the deposit of process fee was itself treated as an application to take a step-in-aid of execution.

To correct sale proclamation.—An application made for the purpose of having the forms of the proclamation corrected, for having a date fixed for the settlement of the terms of proclamation under O XXI. r. 66, and for issue of notice for a specified date is a step-in-aid of execution—*Surajmal v. Sarjoog*, 2 P.L.J. 5, 38 I.C. 540.

For transfer of decree.—An application to the Court which passed a decree, that it may be sent for execution to another Court, is a step-in-aid of execution—*Collins v. Moula Baksh*, 2 All 284, *Latchman v. Maddan*, 6 Cal 513, *Rajbullubh v. Joy Krishen*, 20 Cal. 29, *Chundra Nath v. Gurroo*, 22 Cal 375, *Suja v. Monohur*, 24 Cal. 244, *Rama Nath v. Gouri*, 2 C.W.N. 415, *Bhabani v. Pratap*, 8 C.W.N. 575, *Ramchandra v. Krishna Lal*, 1 Pat 328, A.I.R. 1922 Pat 301, 65 I.C. 332, 3 P.L.T. 298, *Todar Mal v. Bhola*, 35 All 389, *Sahodra v. Bhagwan*, A.I.R. 1926 All 473, 94 I.C. 482. But an application to transfer a decree to a Court which has no pecuniary jurisdiction to try the suit in which the decree was passed and therefore has no jurisdiction to execute the decree, is not a step-in-aid of execution—*Amrit Lal v. Murlidhar*, 1 Pat. 651, A.I.R. 1922 Pat. 188, 67 I.C. 538. An application for transmission of the decree to another Court for execution is a step-in-aid of execution, but the transmission of the decree is not by itself an execution of the decree—*Atherton & Co. v. Habib*, 27 A.L.J. 553, 115 I.C. 805, A.I.R. 1929 All 390 (392).

For fixing date of sale.—A sale of immoveable property having been adjourned, an oral application for the fixing of a fresh date for the sale is an application to enforce the decree—*Amar Singh v. Tika*, 3 All. 139.

For leave to bid at sale.—An application by the decree-holder for permission to bid at the sale in execution of his decree is a step-in-aid of execution. The fact that the decree-holder is prepared to bid for the property and is anxious to purchase it brings the decree within nearer distance of complete execution and satisfaction—*Dalal v. Umrao*, 22 All.

399; *Bansi v. Sikree Mal*, 13 All. 211; *Vinayakarao v. Vinayak Krishna*, 21 Bom. 331; *Troylokya v. Jyoti Prakash*, 30 Cal. 761 (769); *Safia Begam v. Raisunnissa*, 8 O.C. 161. Contra—*Raghunandan v. Kallydutt*, 23 Cal. 690 (692); *Toree Mahomed v. Md. Mabood*, 9 Cal. 730 (732); *Moulvi Md. Shaffee v. Budri Mal*, 88 P.R. 1884. In another Calcutta case, it has been laid down by Mookerjee J. that it cannot be laid down as an inflexible rule that an application for leave to bid at a sale must in every case or may not in any case amount to an aiding of the execution, if the decree-holder can show that the circumstances under which the application was made were such that the grant of leave did in fact aid, or would have aided the execution, the application would be treated as a step-in-aid—*Hira Lal v. Dwija*, 10 C.W.N. 209 (214, 216).

Application not merely asking for leave to bid but also praying that the amount he would bid might be set off against the decretal amount due to him, is a step-in-aid of execution—*Nabadip v. Bepin*, 12 C.W.N. 621, *Vappu v. Sivakataksham*, 53 Mad. 390, 58 M.L.J. 406, A.I.R. 1930 Mad. 588 (589), 123 I.C. 577. An application for re-auction of the property (there being no bid at the first auction) with a prayer for permission to bid at the re-auction is a step-in-aid—*Salig Ram v. Lala Rai Chand*, 60 P.R. 1912, 14 I.C. 468.

To be put into possession—An application made by the decree-holder to be put into possession of the property which he had purchased at an auction held in execution of his decree, is a step-in-aid of execution—*Moti Lal v. Makund*, 19 All. 477; *Kannan v. Arvulla*, 50 Mad. 403, A.I.R. 1927 Mad. 288, 99 I.C. 677; *Lakshman v. Kannammal*, 24 Mad. 185; *Appathurai v. Panayappan*, 57 M.L.J. 468, 122 I.C. 526; *Babu Ram v. Peary Lal*, 41 All. 479, 50 I.C. 143; *Sadashiv v. Vithal*, 35 Bom. 452, 11 I.C. 987, *Sariatoola v. Raj Kumar*, 27 Cal. 709; *Prem Krishna v. Juramoni*, 13 C.W.N. 694, 1 I.C. 430; *Annoda v. Somoruiddi*, 23 C.W.N. 926, 30 C.L.J. 135, 54 I.C. 839. In 23 C.W.N. 926, Cuming J. held, to the contrary, that all steps in execution must be taken by the decree-holder as decree-holder and not as auction-purchaser, and therefore the application mentioned above, not being made by the decree-holder as such, was not a step. This opinion was also expressed by the Allahabad High Court in *Bhagwati v. Banwari Lal*, 31 All. 82 (F.B.) though the question was not definitely before the Full Bench. And this opinion is now confirmed by a recent decision of the same High Court—*Mohsin v. Haider*, 50 All. 670, 26 A.L.J. 498, 115 I.C. 869, A.I.R. 1928 All. 368 (369, 370) (following 31 All. 82 F.B. and dissenting from 19 All. 477 and 41 All. 479). The Patna High Court likewise holds that such an application is not a step, because since the decree-holder takes possession not as decree-holder but as an auction-purchaser, the question between the judgment-debtor and the purchaser cannot be said to be one relating to the execution, discharge or satisfaction of the decree—*Kamal v. Kesho Prasad*, 1 Pat. 701 (705), 4 P.L.T. 226, A.I.R. 1922 Pat. 310, 68 I.C. 638; *Triole Nath v. Hansman*, 2 Pat. 249, A.I.R. 1923 Pat. 22, 5 P.L.T. 30, 72 I.C. 939.

To have witnesses summoned.—An application by a decree-holder, in the course of an investigation into an objection to the attachment of property, to have his witnesses summoned is a step-in-aid of execution—*Kedar Nath v. Lakhi Kari*, 21 C.W.N. 868, 40 I.C. 1005; *Brojendra v. Dil Mahmud*, 22 C.W.N. 1027, 44 I.C. 604; *Mahomed Siddiq v. Misri Lal*, 19 A.L.J. 843, A.I.R. 1922 All. 432, 64 I.C. 524; *Ali Muhammad Khan v. Gur Prasad*, 5 All. 344; *Sheo Sahay v. Jamuna*, 4 Pat. 202, 88 I.C. 807, 6 P.L.T. 777, A.I.R. 1925 Pat. 459, *Surajmal v. Sarjoog*, 38 I.C. 540, 2 P.L.J. 5, *Shugan v. Ramjos*, 5 I.C. 292. So also, the filing of a list of witnesses by the decreeholder in a proceeding to set aside the execution sale at the instance of the judgment-debtor, is a step-in-aid of execution—*Jagdeo v. Bhubaneswari*, 7 Pat. 708, 9 P.L.T. 817, 113 I.C. 582, A.I.R. 1928 Pat. 612 (614).

For issue of a seal warrant.—An application made to the Calcutta Small Cause Court for the issue of a seal warrant is an application to take a step-in-aid of execution—*Jugarnath v. Brojonath*, 29 Cal. 580, *Lachman Das v. Narain Das*, 3 A.L.J. 815.

For certification of payment.—An application by the decree-holder to certify certain payments made by the judgment-debtor is a step-in-aid of execution, provided the payment has actually been made—*Rakhal v. Jogendra*, 10 C.L.J. 467, 3 I.C. 391; *Bacharaj v. Babaji*, 38 Bom. 47, 21 I.C. 407; *Lecky v. Bank of Upper India*, 33 All. 529, *Chote Singh v. Isnari*, 32 All. 257, 7 A.L.J. 251, *Hari Charan v. Hari Charan*, 6 I.C. 43; *Gopal v. Rajendra*, 20 C.W.N. 615, 34 I.C. 625, *Muhammad Husain v. Ram Sarup*, 9 All. 9. In a recent case before the Judicial Committee, their Lordships did not decide (as it was unnecessary in the case to decide) whether a certification of payment amounted to a step-in-aid—*Shri Prakash v. Allahabad Bank*, 3 Luck. 684 (P.C.), 33 C.W.N. 267 (274), 114 I.C. 581, A.I.R. 1929 P.C. 19. The Calcutta High Court has laid down that if a payment is made in part satisfaction of the decree within three years from the date of the decree, and then an application for execution together with an application for certifying the payment is made by the decree-holder within three years from the date of the payment, the application is within time, since the payment may be considered as a step-in-aid of execution—*Jatindra v. Gagan Chand*, 46 Cal. 22, 45 I.C. 903. But the Madras High Court has disapproved of this view and pointed out that it is the application for certifying the payment, and not the payment itself, that can be considered as a step-in-aid of execution, consequently, if a decree is made in 1915, and a payment is made in January 1918 (within 3 years from the date of the decree) but an application for execution (together with an application for certifying the payment) is made in January 1920, the execution is barred—*Narayana v. Kunhi Raman*, 20 L.W. 190, 82 I.C. 743, A.I.R. 1925 Mad. 131.

So also, an application made by the judgment-debtor and signed by the decree-holder, to have certain payments, which were made out of Court, certified, and praying that time be allowed to pay the balance of

the decree, the attachment in the meantime continuing, is a step-in-aid of execution—*Wasl Imam v. Poonit Singh*, 20 Cal 696.

Application to proceed with the case :—On an objection being put in by the judgment-debtor to the execution, the Court ordered the parties to produce evidence in support of their respective cases, and in the course of those objection-proceedings the decree-holder filed a list of witnesses and intimated to the Court that he was ready to proceed with the case. It was held that the decree-holder's action implied an application on his part to the Court to take the evidence which he was prepared to adduce and repel the objection taken by the judgment-debtor, and in effect that this should be taken to be an application to the Court to take some step-in-aid of execution—*Brojendra v Dil Mahomed*, 22 C.W.N. 1027, 44 I.C. 604.

To have objections dismissed :—An application to the Court executing a decree asking that certain objections to the execution of the decree be dismissed is a step-in-aid—*Tamgunnissa v. Najju*, 40 All. 668, 16 A.L.J. 704, 48 I.C. 38. An application by a decreeholder praying that the objections taken by the judgment-debtor to the sale of property in execution of the decree should be disallowed, is a step-in-aid of execution—*Kewal Ram v. Khadim Hussain*, 5 All. 276; *Gobind v. Rung Lal*, 21 Cal 23.

For arrest of surety —An application asking the Court to execute the entire decree by the arrest of the surety who has made himself liable for satisfaction of the decree, is an application to take a step-in-aid of execution of the decree as against the original judgment-debtor—*Mahomed Hafiz v. Mahomed Ibrahim*, 43 All. 152, 18 A.L.J. 988, 58 I.C. 794.

For arrest of judgment-debtor :—An application for execution of a decree by arrest of the judgment-debtor will operate to save limitation in respect of a subsequent application in which the prayer was first for the arrest of the judgment-debtor and secondly for the arrest of two persons who had become sureties for the due satisfaction of the decree by the judgment-debtor—*Badruddin v Muhammad Hafiz*, 44 All. 743, A.I.R. 1922 All. 481, 77 I.C. 129.

For re-arrest of judgment-debtor .—Where an arrested judgment-debtor was released from jail on his applying to be declared an insolvent, an application by the decree-holder for re-arrest of the judgment-debtor is a step-in-aid of execution—*Suraj v. Mahabir*, 33 All. 279.

For final decree for sale :—An application by the holder of a preliminary decree in a mortgage suit, for a final decree for sale, is a step-in-aid of execution—*Gulappa v. Erava*, 46 Bom. 269, A.I.R. 1922 Bom 118, 63 I.C. 84.

Compromise :—A compromise to have the rest of the decree executed on a future date is an application for taking a step-in-aid of execution—*Hindeswari v. Awadh Behari*, 6 I.C. 366.

Application for substituted service :—An application for substituted service is a step-in-aid of execution—*Amina v. Banarasi*, 36 All. 439.

For continuance of sale:—An application by the decree-holder for continuance of the sale in order to secure the attendance of more bidders is a step-in-aid of execution—*Desireddy Yellamandar v. Sitakolli Chinna*, 16 M.L.T. 103, 1 L.W. 573, 25 I.C. 58.

716. Step, what is not:—An application by a decree-holder asking for the release of a portion of the property from attachment, for postponement of the sale and for the striking of the case off the file, the attachment of the remainder of the property being maintained, is not an application to take some step-in-aid of execution because it does not 'aid' or advance the execution proceedings—*Abdul Hossein v. Fozilun*, 20 Cal. 255; *Fakir v. Ghulam*, 1 All 580.

When a person goes to serve notice on the judgment-debtor as mentioned in old cl. 6, the mere fact that the decree-holder accompanied the peon to identify the judgment-debtor is not itself a step-in-aid of execution—*Jugalkishor v. Chintamani*, 18 C.W.N. 1288, 27 I.C. 225, nor does the filing by the peon of an affidavit of service of the notice on the judgment-debtor amount to a step-in-aid of execution—*Annapurna v. Dhirendra*, 24 C.W.N. 55, 30 C.L.J. 518, 54 I.C. 1. But see page 797 ante.

Where a decree has been lost or destroyed, an application to the Court to reconstruct the decree is not a step, because it is needless for the decree-holder to have the decree restored before he applies for execution. Limitation will run from the date when the judgment was pronounced—*Raj Gir v. Ishwardhari*, 11 C.L.J. 243, 5 I.C. 660.

An application by a decree-holder, who has himself purchased the judgment-debtor's property, to receive the amount of poundage fee from him is not a step-in-aid of execution—*Aghore Kali v. Prasanno*, 22 Cal. 827; *Anando v. Harasundari*, 23 Cal. 196.

An application by the decree-holder for return of the decree to him for the purpose of enabling him to execute his decree subsequently is not a step—*Mahalinga v. Narayana*, 6 M.L.J. 23, *Aghore Kali v. Prasanno*, 22 Cal. 827, *Rajaram v. Banaji*, 22 Bom. 311.

An application made by both the parties to postpone the hearing of a pending execution with a view to arrive at a compromise is not a step-in-aid of execution, because such an application is not made in furthering the execution of a decree, but on the contrary it is a step which if successful would avoid the necessity for execution—*Vishnu v. Narasimha*, 25 Bom. L.R. 490, A.I.R. 1923 Bom. 461, 73 I.C. 1011.

An application by the decree-holder to be allowed to set off the purchase-money of the property purchased at auction by the decree-holder himself, against the decree, instead of paying it into Court, is not a step-in-aid of execution—*Anando v. Harasundari*, 23 Cal. 196. Contra—*Safia Begam v. Raisunnissa*, 8 O.C. 161; *Nabadwip v. Bepin*, 12 C.W.N. 621.

An application by the decree-holder for sanctioning an agreement to give time to the judgment-debtor for payment, and not for execution of the decree, is not a step-in-aid of execution—*Barrow v. Joverchund*, 19 Mad. 67.

An application by the decree-holder for a list of the properties attached in execution of his decree is not a step-in-aid of execution—*Ranga Chariar v. Balaramasami*, 21 Mad. 400.

An application by a decree-holder opposing the application of the judgment-debtor to sell the property in a certain order, is not a step-in-aid of execution—*Troylokya v. Jyoti Prokash*, 30 Cal. 761 (771).

An application by the decreeholder objecting to the judgment-debtor's application to record satisfaction of the decree is not a step-in-aid of execution—*Kuppuswami v. Rajagopala*, 45 Mad. 466 (470), 42 M L J 303. A I.R. 1922 Mad 79, 70 I C. 324; *Krishna v. Seetharama*, 50 Mad. 49, 98 I C. 456, A.I.R. 1926 Mad 1178 (1180).

Where an application for execution by an assignee of a decree from an adult decreeholder who transferred the same on behalf of himself as well as his own minor brothers, was dismissed in toto, as leave of the Court was not obtained for the assignment, such application, being made by a person not entitled to make it, was not a step—*Kailasa v. Ramanuja*, 6 L.W. 19, 39 I.C. 950

An application which asks for a relief beyond and outside the decree altogether is not a step-in-aid of execution—*Pandarath v. Lila Chand*, 13 Bom 237, *Bando v. Narasinha*, 37 Bom 42, 14 Bom.L.R. 861, 17 I C 210, *Nathabhai v. Pranjivan*, 34 Bom. 189.

An application asking for time is not a step-in-aid of execution—*Kartick v. Juggernath*, 27 Cal. 285 (288). But under certain circumstances it may amount to a step-in-aid See page 798 *ante*.

In the absence of an application to proceed with the sale, the mere filing of an affidavit by the decree-holder stating that there are no incumbrances over the property does not amount to a step-in-aid of execution—*Churanji v. Ganga Sahai*, 22 A.L.J. 410, A I.R. 1924 All. 811, 78 I C. 631.

When the judgment-debtor has applied for insolvency, the resistance of the decree-holder to the judgment-debtor's application will not amount to the taking of a step-in-aid of execution—*Langtu v. Baijnath*, 28 All. 387 (390).

Application for copy of decree—An application by a decree-holder for a copy of the decree is not a step-in-aid of execution—*Gopilandhu v. Domburu*, 11 Mad. 336; *Ganga Pershad v. Debi Sundari Dabia*, 11 Cal 227, *Rajkumar Banerjee v. Raj Lakhi Debi*, 12 Cal. 441; *Muthia Vecthi v. Irakkat Karnavan*, 39 M L J. 572, 60 I.C. 117.

To bring decree into conformity with judgment:—An application to amend a decree or to bring a decree into conformity with the judgment cannot be treated as a step-in-aid of execution—*Kallu v. Fahiman*, 13 All 124; *Daya Kishen v. Nanhi Begam*, 20 All. 304; *Ashanulla v. Dakshiri*, 27 All. 575. But when such amendment is made by the Court, it will give a fresh starting point of limitation for the execution of the decree under clause 4

For stay of execution:—An application by the decree-holder for the execution proceedings is not a step-in-aid of execution—*Fakir v. Ghulam*, 1 All. 580.

For postponement of sale:—An application by the decree-holder for postponement of sale in execution on the ground that he had allowed time to the judgment-debtor is not a step-in-aid of execution—*Mānath Kaari v. Debi Balhsh Rai*, 3 All. 757. An application by the decree-holder for postponement of the sale not with a view to enable him to bring the properties to sale more advantageously to him, but on other grounds, is not a step-in-aid of execution—*Troilokya v. Jyoti Prakash*, 30 Cal. 761. But a joint application made by the decree-holder and judgment-debtor stating that a certain payment has been made by the judgment-debtor and that the decree-holder has agreed to give time to the judgment-debtor for the payment of the balance, and praying that the sale may be postponed and time granted, constitutes a step-in-aid of execution—*Sitla v. Sheo Prosad*, 4 All. 60

To take out money:—According to the Calcutta High Court and Punjab Chief Court, an application made by a judgment-creditor to take out of Court certain moneys deposited by the judgment-debtor, or to withdraw a money awarded to him upon rateable distribution, or to take out the proceeds of an execution sale of the judgment-debtor's property, is not a step-in-aid of execution. The reason is, that so long as the money or the fund out of which payment is sought has not been realised in execution, an application for payment of the money is an application to take a step-in-aid of execution. But when the moneys have been realised and are lying in Court, an application for payment of the money is an application for merely a ministerial order, and not to take a step-in-aid of execution—*Hem Chunder Chowdhury v. Brojo Sundari Devi*, 8 Cal. 89, *Fazal Imam v. Metta Singh*, 10 Cal. 549, *Gunga Pershad Bhoomik v. Debi Sundari Dabia*, 11 Cal. 227, *Sadananda v. Kali Sankar*, 10 C.W.N. 28, *Kasu v. Atar Singh*, 103 P.R. 1908, 207 P.L.R. 1908 (F.B.); *Mulchand v. Kour Singh*, 27 P.R. 1888. But according to the other High Courts, it is a step—*Venkatarayulu v. Narasimha*, 2 Mad. 171; *Koormayya v. Krtshnamma*, 17 Mad. 165; *Paran Singh v. Jawahir Singh*, 6 All. 366, *Kerala Verma v. Shankaram*, 16 Mad. 452, *Bapuchand v. Mugutrao*, 22 Bom. 340; *Sujan Singh v. Hira Singh*, 12 All. 399, *Mulchand v. Jamanbi*, 27 Bom. L.R. 671, A.L.R. 1925 Bom. 443, 89 I.C. 228

The Madras High Court has made another kind of distinction, viz. that if the monies lying in Court are the proceeds of an execution sale, the application by the decree-holder for payment of the money is a step-in-aid of execution, but if the monies lying in Court are not the proceeds of a sale in execution of the decree, but have been deposited by the judgment debtor (or his agent) for payment to the decree-holder, the decree-holder's application for payment is not a step-in-aid of execution—*Balaguruswami v. Guruswami*, 48 M.L.J. 506, A.L.R. 1925 Mad. 703, 87 I.C. 989, *Appaswami v. Jotha Naicken*, 22 Mad. 448. The Bombay High Court has expressed the opinion that there is no difference between money paid into Court in satisfaction of a decree and money lying in Court which is the proceeds of a sale held in execution of the decree—*Mulchand v. Jamanbi*, (supra)

For confirmation of sale:—As the Court is bound to confirm a sale after thirty days, in the event of no application under section 311 C. P. C. being made, an application to confirm the sale cannot be regarded as one in aid of execution even though it is made by the decree-holder as purchaser—*Umesh v. Shib Narain*, 31 Cal. 1011 (dissenting from *Gobind v. Rung Lal*, 21 Cal. 23 and *Kewal Ram v. Khadim*, 55 All. 576); *Panchanan v. Nrisinha*, 11 C.L.J. 356, 6 I.C. 264; *Triloke Nath v. Bansman*, 2 Pat. 249, A.I.R. 1923 Pat. 22, 5 P.L.T. 30, 72 I.C. 938

For recovery of costs:—An application for realisation of costs incidental to the execution proceedings is not an application for the execution of the original decree or any part of it—*Sahu Nandlal v. Sahu Dharam*, 48 All. 377, A.I.R. 1926 All. 440, 94 I.C. 961. A decree was passed directing the execution of a *muchalka* by the defendant in favour of the plaintiff, and for costs. An application was made for enforcement of the decree by execution of the *muchalka*. This application was made more than 3 years after the last application for the same relief, and less than three years after the last application for realisation of the costs of certain execution proceedings. Held that the last application for realisation of costs was for incidental costs in execution, and was not an application for execution of the decree or any part of it. Consequently it could not save limitation so far as the relief by way of execution of the *muchalka* was concerned—*Appu Rao v. Ramakrishna*, 24 Mad 672.

718. Clause 6 :—Restitution:—The old clause 6 has been replaced by an entirely new clause, and this new clause is intended to set at rest the conflict of decisions as to whether an application for restitution fell under Article 181 or Article 182.

An application made to obtain *restitution* under a decree in accordance with section 583 of the old C. P. Code (1882) was held to be a proceeding in execution of that decree, and governed by this Article—*Venkayya v. Raghavachariu*, 20 Mad 448; *Nand Lal v. Sita Ram*, 8 All. 545. In *Karupam v. Sadasivam*, 10 Mad 66, *Gangadhar v. Lachman*, 11 C.L.J. 541, 6 I.C. 125, and *Harish Chandra v. Chandra Mohan*, 28 Cal. 113, however, such an application was held to fall under Article 181. So also, the question as to whether this Article applies to an application under the new C. P. Code (section 144) has been the subject of conflicting decisions. In the following cases it has been held that the words "an application for execution of a decree" occurring in this Article mean an application to enforce the decree, and in the case of applications for restitution on reversal of a decree, the legal obligation arising from the appellate decree itself is sought to be enforced, and not any independent obligation. Consequently an application for restitution is an application for execution of a decree and is governed by Art. 182, and not by Article 181—*Unnamalai v. Nathan*, 33 M.L.J. 413, 42 I.C. 530; *Somasundaram v. Chokkalingan*, 40 Mad. 780 (782); *Kurgodigowda v. Ningangowda*, 41 Bom. 625 (630), 19 Bom. L.R. 638, 41 I.C. 238; *Hamidalli v. Ahmedalli*, 45 Bom. 1137, 23 Bom.L.R. 480, A.I.R. 1921 Bom. 67, 62 I.C. 233. But the Punjab Chief Court and the Patna High Court have drawn a distinction between

sec. 583 of the old C. P. Code and sec. 144 of the new Code, and are of opinion that an application for restitution under sec. 583 of the old Code was an application for execution within the meaning of Art. 182, but under the new Code of 1908, an application for restitution, unless such is expressly ordered by the Appellate Court, is not an application for execution, but is a miscellaneous application in the nature of an application for execution and falls under Art 181—*Ram Singh v. Sham Parshad*, 15 P.L.R. 1918, 44 I.C. 301, 67 P.R. 1918, *Chandra Singh v. Bishen Singh*, A.I.R. 1924 Lah. 166, 76 I.C. 501, 5 Lah. L.J. 389; *Kripa Sindhu v. Mahanta Balbhadra*, 47 I.C. 47, 3 P.L.J. 367 (369, 371); *Balmukund v. Basanti Kumari*, 3 Pat. 371 (387) (F.B.) A.I.R. 1925 Pat. 1, 78 I.C. 200 (overruling *Basant Kumari v. Balmukund*, 2 Pat. 277). The Calcutta and Allahabad High Courts are also of opinion that an application for restitution under sec. 144, C. P. Code 1908, is governed by Article 181—*Fazlar Rahman v. Abdul Samad*, 92 I.C. 960, A.I.R. 1926 Cal. 981; *Hanifunnissa v. Chunni*, 19 A.L.J. 549, 63 I.C. 184 (185); *Asutosh v. Upendra*, 21 C.W.N. 564 (569), 38 I.C. 17; *Harī Mohan v. Parameshwar*, 56 Cal. 61, 32 C.W.N. 971 (972, 982), A.I.R. 1928 Cal. 640.

According to the new clause 6 of this Article, an application for restitution (in respect of money) is treated as an application for execution; but it should be noted that this clause applies only where restitution is applied for in pursuance of a decree obtained in a *separate suit* brought for the purpose of obtaining the restitution, and not where restitution is applied for in consequence of the reversal of the original decree on appeal or review. The scope of this clause is limited, for sub-section (2) of sec. 144 C. P. Code expressly bars a separate suit for restitution, and allows it only where the restitution could not be obtained by an application under sec. 144.

The period of limitation runs from the date of the decree passed in the suit for restitution, if there is an appeal, time runs from the date of the order of the final Appellate Court confirming the decree of the first Court, and not from the date of the decree of the first Court. Cf. *Fazlar Rahman v. Abdul Samad*, 92 I.C. 960, A.I.R. 1926 Cal. 981. The ruling in *Harī Mohan v. Parameshwar*, 56 Cal. 61, 32 C.W.N. 971 (according to which time runs from the original order of restitution, and not from the Appellate order) does not seem to be correct.

Where an application is made to obtain restitution as the necessary result of the order of His Majesty in Council, the application is to be taken as one to enforce an order of His Majesty in Council, and falls under Art. 183—*Sohan v. Baijnath*, 50 All. 767, 26 A.L.J. 587, 112 I.C. 876, A.I.R. 1928 All. 293 (294); *Brij Lal v. Damodar*, 44 All. 555, 66 I.C. 545, A.I.R. 1922 All. 238.

719. Clause 7 :—Instalment decrees :—When a decree is made payable by instalments, with the further provision that in default of payment of any instalment the whole of the money shall become due and be recoverable by execution, the decree falls under this clause, because ✓

whole amount must be held to have been directed to be paid on the date of such default; and limitation for execution begins to run when the first default is made—*Mon Mohun v. Durga Churn*, 15 Cal. 502 (505); *Bir Narain v. Darpa Narain*, 20 Cal. 74; *Judhistir v. Nobin*, 13 Cal. 73 (75); *Zahur Khan v. Bhaktawar*, 7 All. 327 (330); *Dulsook v. Chugon*, 2 Bom. 356; *Shib Dat v. Kalka*, 2 All. 443; *Shankar v. Jalpa*, 16 All. 371 (372); *Ugranath v. Laganmani*, 4 All. 83 (85); *Raichand v. Dhandu*, 42 Bom. 728; *Chattar v. Amir*, 38 All. 204 (207); *Allah Baksh v. Bhawani*, 100 P.R. 1902, *Sk. Elahy Bux v. Nawal Lal*, 4 P.L.J. 159 (162), 50 I.C. 364. But a Full Bench of the Allahabad High Court has recently laid down that where a decree (a) directed payment of the decretal amount by instalments on particular dates and (b) also authorised the decreeholder in the case of a default in the payment of two successive instalments to realise the balance of the decretal amount at once, held (a) that if the application for execution was an application under the first part of the decree to recover certain instalments already overdue, Article 182, cl. 7 applied and limitation ran in respect of each instalment from the date on which it became payable, (b) but if the application for execution was an application under the second part of the decree to recover the entire balance of the decretal amount at once upon default, this clause could not apply, because at the date of the decree it was not certain whether and when the default of two consecutive payments would occur; it was therefore impossible to say that the decree had fixed a certain date for the payment of the whole amount in a lump sum. Such a date was not at all certain (the word 'certain' means a date which must certainly occur). Consequently, Article 181 (the general Article) applied, and time ran from the date of the later of the last two successive instalments unpaid—*Joti Prasad v. Srichand*, 51 All. 237 (F.B.), 26 A.L.J. 966, A.I.R. 1928 All. 629 (634, 639), 112 I.C. 73.

Where payments were made towards an instalment decree (which contained the usual default clause) but such payments were not certified, the Court would assume that no payments were made, and so the period of limitation ran from the date when the first instalment was due—*Chattar Singh v. Amir Singh*, 38 All. 204 (207); *Mithu Lal v. Khairati*, 12 All. 569 (570). Where an instalment decree directed that in case of failure of payment of an instalment, the decree-holder was to wait for one year, and that if during that time the debtor did not pay the amount of the instalment the decree-holder would be entitled to recover the whole amount, held that the time for the execution of the decree ran from the expiry of one year after the date of default—*Hira Chand v. Abu Lala*, 46 Bom. 761, A.I.R. 1922 Bom. 85, 67 I.C. 153, 24 Bom.L.R. 269.

On 30th September 1916, the plaintiff obtained a decree by which certain properties were to be left in possession of the defendant, who was to pay to the plaintiff annually a sum of Rs. 2,000 in the month of Kason, or in default of payment of the same (Rs. 2,000 annually) the said properties would be made over to the plaintiff. On 8th October 1924, the plaintiff-decree-holder filed an application for execution of the decree

against the defendant-judgment-debtor in default of payment of two instalments of Rs 2,000 each, for 1923 and 1924 respectively, and claimed, as the judgment-debtor failed to pay according to the decree, that the Court might direct the delivery of the lands by the judgment-debtor to the decree-holder. It was pleaded that execution was time-barred. Held that upon a true construction of the decree, each instalment as it became due was a claim originating under the decree from the date when such claim arose and that Article 182, clause 7 applied; that on the occasion of a default in each payment, the right of the decree-holder to have the property made over to him arose and therefore the claim to the lands was not time-barred; that time did not necessarily run from the date of the earliest default, if any occurred before 1923—*Maung Sin v Ma Tok*, 5 Rang. 422 (P.C.), 32 C.W.N. 1, 53 M.L.J. 22, 29 Bom. L.R. 1014, A.I.R. 1927 P.C. 146, 101 I.C. 736

Waiver:—On the application of the principle of Article 75 it has been held that even though an instalment decree provides that on default of payment of any one instalment, the whole amount shall become due, it is open to the decree-holder to waive the default by accepting an overdue instalment (instead of putting into force the decree for the whole amount at once upon the default), and to apply for execution in respect of a subsequent instalment on a fresh default, and this application will not be barred on the ground that more than three years have elapsed after the first default—*Ram Culpoo v. Ram Chunder*, 14 Cal 352 (355); *Mon Mohun v. Durga Charan*, 15 Cal 502 (505), *Kashiram v. Pandu*, 27 Bom 1 (13) (F.B.); *Hurri Pershad v. Nasib Singh*, 21 Cal 542 (546), *Jalim Chand v. Yusufali*, 54 Cal 143, A.I.R. 1925 Cal 1012, 86 I.C. 1051, *Rajeswar v. Hari*, 19 Mad 162. In two earlier Bombay and Allahabad cases it was held that since in this clause no mention is made of waiver as in Art 75, the principle of waiver did not apply to instalment decrees. A decree-holder was therefore always bound to take out execution within 3 years from the first default—*Dulsook v. Chugon*, 2 Bom 356, *Ugrah Nath v. Laganmani*, 4 All 83 (85). But the Bombay case is impliedly overruled by 27 Bom. 1 (F.B.) cited above.

Where a decree payable by instalments provides that the decree-holder shall have *discretion* or *option*, on default being made in payment of any one instalment, to realise the full amount of the decree with interest without waiting for any future instalment, the period of limitation does not necessarily run from the date of the first default—*Janki v. Ghulam Ali*, 5 All 201 (206). This clause applies only where the decree directs any payment to be made on a certain date. If however, the decree provides that the decree-holder shall have '*discretion*' to realise the whole decretal money when the default is made, the date of default cannot be taken as being the date directed by the decree. In such a case, the decree-holder is not bound to execute his decree for the whole amount remaining due as soon as the first default is made, but he may waive the default by receiving the overdue instalment and execute the decree for the subsequent instalments as they become due. Time runs from the

due date of each instalment—*Lachmi v. Sarju*, 39 All. 230 (233), 15 A.L.J. 102, 38 I.C. 634; *Nilmadhuv v. Ramsodoy*, 9 Cal. 857 (860); *Appayya v. Papayya*, 3 Mad. 256; *Allah Baksh v. Bhawani*, 131 P.L.R. 1902, 100 P.R. 1902, *Kishen Chand v. Bhai Gopal*, 6 P.R. 1913, 172 P.L.R. 1912, 16 I.C. 842, *Shankar v. Jalpa*, 16 All. 371 (374). In such a case, the decree-holder's omission to apply for execution of the whole decree within three years of the first default, will only affect his right to recover the instalment in respect of which the default was made and to recover the whole of the decretal amount at once, but will not affect his right to recover subsequent instalments which fell due within three years before the application for execution—*Asmatulla v. Kally Churn*, 7 Cal. 56 (60); *Allah Baksh v. Bhawani*, *supra*; *Kishen Chand v. Bhai Gopal Singh*, *supra*.

In order to constitute waiver, there must be payment and acceptance of an overdue instalment. The mere silence on the part of the decree-holder, or his abstinence from suing after there has been a default, does not amount to a waiver on his part—*Hurri Pershad v. Nasib Singh*, 21 Cal. 542 (547), *Bir Narain v. Darpa Narain*, 20 Cal. 74 (78); *Kashiram v. Pandu*, 27 Bom. 1, *Chattar Singh v. Amir Singh*, 38 All. 204 (207). And this is so, whether the decree provides that on non-payment of an instalment the whole amount shall become due, or it provides that on non-payment of an instalment the whole amount may be sued for—*Hurri Pershad v. Nasib Singh* (*supra*). There must be proof of payment of the overdue instalment. Where the decree-holder alleged payment of an instalment by the judgment-debtor, which the latter denied, and the payment has not been certified, held that there was no evidence of payment, and consequently no evidence of waiver; and therefore limitation ran from the date of the first default—*Mitthu Lal v. Khairati*, 12 All. 569 (571). But see *Zahur v. Bakhtawar*, 7 All. 327 (330); *Rajeswara v. Hari*, 19 Mad. 162, and *Hurri Prasad v. Nasib Singh*, 21 Cal. 542 (549) where it was held that the mere fact that the payment was not certified was not a ground for holding that the payment could not be recognized by the Court in evidence of waiver.

So long as there is no waiver, the decree-holder is entitled to execute the whole decree (i.e. for the whole amount remaining due) as soon as a default is made; but if the decree-holder waives a default by receiving an overdue instalment, he cannot, upon a subsequent default, put in force the decree as a whole, to recover the remaining instalments that are due all at once; he can execute the decree only for those instalments which are due. Time in respect of each such instalment runs from the due date of that instalment—*Buddhu Lal v. Rekkhab Das*, 11 All. 482 (485); *Nilmadhuv v. Ramsodoy*, 9 Cal. 857 (860); *Radha Prasad v. Bhagwan*, 5 All. 289 (292). In other words, the acceptance of the overdue instalments will amount to a waiver of the decree-holder's right to enforce the penalty which the decree allowed to him in the event of failure to pay the instalments—*Radha Prasad v. Bhagwan*, (*supra*).

If the decree-holder wishes to execute the entire decree, owing to default in the payment of instalment, he must bring his application within

three years of the date of the first default. If he brings his application to execute the whole decree more than three years after the date of the first default, he will not be allowed, in order to save his application from limitation, to fall back upon the instalment arrangement and claim to recover the instalments that fell due within three years before the date of the application—*Bir Narain v. Darpa Narain*, 20 Cal. 74 (78).

So also, where the holder of an instalment decree has once applied for execution of the entire decree, upon a default being made in the payment of an instalment, and has thus elected to put an end to the instalment arrangement, he cannot subsequently fall back on the provisions of the decree relating to payment by instalments, for the purpose of saving limitation. Thus, where upon the judgment-debtor's failure in the payment of two instalments in 1900 the decree-holder applied for execution of the decree for the whole amount on the 15th May 1901, but the application having been dismissed for default of prosecution, he again applied on the 1st July 1904 for execution, for recovery of such instalments as remained unpaid, held that the application was barred by limitation, as it was no longer open to the decree-holder to adhere to the instalment arrangement—*Bhagwan Das v. Janki*, 28 All 249 (251).

The question whether the decree-holder may waive the benefit of the provision or must execute his decree within 3 years from the due date of the first instalment of which default is made in payment, is a question purely of construction to be decided on the terms of the whole decree in each case—*Judhistir v. Nobin*, 13 Cal. 73 (75). An instalment decree is to be construed as much as possible in favour of the decree-holder, and unless the decree clearly leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount under it, the decree-holder may execute it on the happening of the first, second or any subsequent default, and limitation will run against him in respect of each instalment separately from the time when such instalment may become due—*Shankar v. Jalpa*, 16 All 371 (373); *Lachmi Narain v. Sarju*, 39 All 230 (233), *Allah Baksh v. Bhawani*, 100 P.R. 1902, 131 P.L.R. 1902.

In a suit on a pronote, a compromise petition for instalment decree was filed in which there was a provision that default being made in the payment of one kist the whole amount would become due; and subsequently an instalment decree was passed in which the amount was decreed as per instalments but the condition as to the whole amount being due in default of payment of one kist was not stated. It was held that the decree and the compromise petition might be taken together and that the terms of the compromise should be taken as incorporated into the decree, so that the decree must be construed as one providing that the whole amount of the decree would become due on the default in payment of one kist—*Jayanuddin v. Jamiruddin*, 21 C.W.N. 835, 37 I.C. 916.

Certain date :—Where a decree directed that the amount decreed should be paid on the expiration of 5 years, the period of limitation for

execution ran from the day on which the period of 5 years from the date of the decree expired; and therefore an application made within 8 years from the date of the decree was within time—*Ram Lal v. Natha Singh*, 45 P.R. 1882.

In the Act of 1871, the words in this clause were "specified date"; and so, where a decree directed that a certain sum shall be paid 'annually' or 'monthly,' held that it was not a decree for money to be paid on a specified date, within the meaning of this clause, and limitation ran from the date of the decree; in order to bring a case within this clause, a definite date in each month or year should be inserted in the decree for the payment of each instalment—*Sabhanatha v. Lakshmi Ammal*, 7 Mad. 80; *Yusuf v. Sirdar*, 7 Mad. 83. After the word 'specified' has been substituted by the word 'certain,' it has been held that if in a decree a certain sum is ordered to be paid monthly or annually, it means that the amounts decreed are to be paid monthly or yearly from the date of decree i.e. on the date of each month or year corresponding to the date of the decree—*Lakshmibai v. Madhavrav*, 12 Bom 65; see also *Md. Kamaruddin v. Piari Lal*, 13 P.R. 1892. Although a decree may not in express terms fix a specified date, yet if it can be gathered from the decree that payments are directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree, the requirements of this clause are satisfied—*Kaveri v. Venkamma*, 14 Mad 390. The substitution of the word 'certain' in place of 'specified' in this clause has widened the scope of its meaning. It is no longer necessary to mention by the year, month and day the exact date in the decree. It simply requires a 'certain' date. The word 'certain' is used in contradistinction to 'uncertain'. It obviously means a date which though not expressly mentioned or ascertained must yet be a date which must certainly occur—*Joti Prasad v. Srichand*, 51 All 237 (F.B.), A.I.R. 1928 All. 629 (634), 112 I.C. 73. Thus, where a decree directed the defendants to pay maintenance to the plaintiff at a certain rate per year from the date of the plaint, which was 18th July 1876, until her death, it was held that the proper construction of the decree was that payment should be made on the 18th July 1877, 18th July 1878, and so on in every subsequent year on the corresponding date; and so the decree was one which directed payment to be made on a certain date—*Aitarima v. Naraina*, 30 Mad. 504.

Where a money decree directs that the plaintiff should not be entitled to take out execution of the decree until after a certain event, e.g. until the disposal of the petition for insolvency made by the defendants, held that clause 7 cannot apply, because there is no direction in the decree that any payment is to be made at the date of the disposal of the insolvency petition or on any other date—*Ashrafuddin v. Bepin Behari*, 30 Cal. 407 (412).

A decree which directs the sale of the mortgaged property in default of payment of the mortgage-money within the date fixed in the decree is not a decree 'directing the payment of the amount to be made on a certain date' within the meaning of this clause, and an application for sale

of the property upon non-payment of the money within the date fixed is not an application to 'enforce payment of the money.' This clause does not apply and the application falls under Article 181. If, however, there is also a personal decree against the mortgagor, and the application is to enforce the decree as such, limitation will run from the date of the decree under clause 1 if payment is enforceable under the decree from the date thereof, or from a future date under clause 7 if payment can be enforced only on or after such future date fixed in the decree—*Rungiah Goundan v. Nanjappa*, 26 Mad 780 (784) See also 16 All 237 cited in Note 693 under Article 181.

If a decree passed by the trial Court in 1911 directed payment to be made in three instalments on March 15, 1912, March 15, 1913 and March 15, 1914, and the decree was finally confirmed by the appellate Court in October 1914, *held* that the dates for payment must be taken to be 15-3-1915, 15-3-1916, and 15-3-1917, as the effect of confirmation by the appellate Court was to extend the time—*Darubhai v. Bechar*, 49 Bom. 305, 27 Bom. L R 196, 86 I C. 894, A I R 1925 Bom 270

720. Explanation I—Separate rights and liabilities :—Where a decree is passed separately against several persons, an application for execution against one of them is inoperative to keep the decree alive against the others—*Ghulam Muhiuddin v. Damber Singh*, 40 All. 206 (209) A decree against one person for arrears of the rent of one period, and against another for rents for another period, must be taken as a separate decree against each for the portion for which each is declared liable, and consequently the execution proceedings against one would not prevent the law of limitation from barring the execution against the other—*Wise v. Rajnarain* 10 B L R 258 (F B) Where a plaintiff obtained separate decrees against several persons in respect of several duties which they were to perform separately, and the plaintiff chose to proceed in the first instance against some and not against the others, in taking out execution, it was held that the proceedings taken at different times were not continuous, and that limitation would run separately from the date of the latest action in each case—*Hurryhur v. Hridoy*, 25 W R 310 A decree which specified different sums as being realisable from three distinct tenures must be construed as three distinct decrees, and a prior application in respect of the sum decreed, so far as one of the tenancies was concerned, could not operate to save limitation for the sum due under the other tenancies—*Dhirendra v. Nischintapore Co*, 36 I C. 398 (Cal) Where a decree was passed originally in favour of one person, and was afterwards owned by more persons than one in severalty by virtue of assignment from the original single decree-holder, it cannot be said that the decree has been "passed severally in favour of more persons than one" within the meaning of the first sentence of this Explanation The rights of all the several decree-holders in this case will be treated as *joint*, and an application for execution made by one of them will keep the decree alive in favour of all—*Venkata Reddaya v. Yera Kayya*, 45 Mad. 35, A.I.R 1922 Mad. 129, 69 I C. 277.

sequently an application in accordance with law and kept the father's decree alive—*Ramaswami v. Anda Pillai*, 14 Mad. 252 (reviewing *Ramaswami v. Anda Pillai*, 13 Mad. 347).

Where a decree awards mesne profits against A and B jointly, and costs against A, B, and C jointly, an application to execute the decree for mesne profits against A and B keeps alive the right to execute the decree for costs against C—*Subramanya v. Alagappa*, 30 Mad 268, followed in *Puttayya v. Pattanayya*, 47 M.L.J 608, A I R 1925 Mad 152, 84 I.C. 897.

Where a decree is jointly passed against all the defendants in one matter, and severally against different defendants with respect to other matters, the first portion of this Explanation should apply to that portion of the decree which is passed severally, and the second portion of the Explanation will apply to that portion of the decree which is passed jointly. In such a case, the execution of the joint portion of the decree against one of the joint judgment-debtors will not keep the decree alive so as to save from limitation an application for execution of the several portion of the decree against a judgment-debtor who was not a party to the previous execution proceeding. Because, while the decree-holder was executing the joint portion of the decree against one of the joint judgment-debtors, there was nothing to prevent him from executing the other portion of the decree against the several judgment-debtors who were liable thereunder—*Sahu Nandlal v. Sahu Dharam*, 48 All 377, 24 A.L.J. 465, 94 I C 961, A I R. 1926 All 440. But the Madras High Court holds that a decree is a joint decree if any portion of the relief given in the decree is against the defendants jointly, even though some other reliefs may be given against each defendant separately—*Pattanaya v. Pattayya*, 50 M L J 215, 92 I C 782, A I R. 1926 Mad. 453 (following 30 Mad 268).

The Explanation lays down that where a decree has been passed jointly against more persons than one, the application if made against any one or more of them shall take effect as against them all. But this Explanation does not say that an order made on such an application is to be binding against all. Therefore, where a decree was passed against 4 persons, and an application for execution was made against two of them after the period of limitation, but nevertheless the Court ordered execution, the order was not binding on the other two judgment-debtors who were not parties to the execution proceedings, and consequently they are not precluded from showing that the previous application was time-barred—*Harendra Lal v. Sham Lal*, 27 Cal 210 (215, 216).

Where in a mortgage suit against the members of a joint Hindu family, it was found that a portion only of the mortgage debt was incurred for legal necessity, and in respect of such portion the usual mortgage decree was passed against all the defendants, and simultaneously a simple money decree for the balance was passed against the two executors of the bond in suit, held that the decree-holder's application for execution of the decree for sale would keep alive the simple money-

decree passed against two of the defendants—*Ram Brichh Rai v. Deo Tewari*, 44 All. 166, 65 I.C. 358, A.I.R. 1922 All. 388.

A decree was passed against some major persons and two minors. Application was at first made to execute the decree against the minors. The decree as against the minors was set aside on objection being taken by them. The decree-holders thereupon applied to execute the decree against the major judgment-debtors. *Held* that the prior application against the minors only took effect against all the judgment-debtors, and helped to keep the decree alive, as the liability of the minors and of the majors was a joint liability—*Lalta Prasad v. Suraj Kumar*, 31 All. 309.

The latter portion of the 2nd para of the Explanation 1 lays down that if the judgment-creditor does something which keeps alive a joint decree as against one of the joint judgment-debtors, the decree is to be regarded as alive as against all the joint judgment-debtors, and if it is alive, it is of course capable of execution. But where one of the joint judgment-debtors has prevented the decree-holder by fraud or force from executing his decree against that judgment-debtor, he is no doubt entitled to claim extension of time against the person, but not against the other judgment-debtor who has not prevented him by force or fraud. Explanation I does not apply to this case, because the judgment creditor has done nothing to keep alive the decree but relies upon something (i.e. fraud or force) which one of his judgment-debtors has been doing—*Abdul Khader v. Ahammad*, 38 Mad. 419 (422).

An application for execution against one of the representatives of a sole judgment-debtor saves limitation against all the representatives because the liability of all the representatives is a joint one—*Krishnaji Janardan v. Murarav*, 12 Bom. 48; *Ram Anuj v. Hinghku Lal*, 3 All. 517; *Arusupalli v. Marikurathu*, 22 M.L.J. 169, 13 I.C. 313. Similarly an application for execution by some only of the decree-holder's legal representatives, though not purporting to be on behalf of the other legal representatives also, is sufficient to save limitation as regards all—*Vasudevapatta v. Narayanapanigrahi*, 1916 M.W.N. 112, 31 I.C. 853.

Surety—Where before or after the passing of a decree a party has stood as surety for the due performance of the decree, it may be executed against the surety in the same manner as it may be executed against the defendant, under sec. 253 C. P. Code 1882 (sec. 145 of the present Code). But that does not imply that the surety is jointly liable with the principal debtor, or that the decree is "jointly passed" against the principal debtor and surety within the meaning of this Explanation. Unless the decree is expressly passed against both of them jointly, no joint liability will be deduced by combining the surety bond with the provisions of sec. 253 of the C. P. Code, and an application for execution against one will not keep the decree alive against the other—*Narayan v. Timmaya*, 31 Bom. 50, 8 Bom.L.R. 807; *Yusuf Ali v. Sayad Amin*, 47 Bom. 778, 25 Bom.L.R. 810, A.I.R. 1923 Bom. 368, 73 I.C. 233; *Raghubandan v. Kirtyanand*, 8 Pat. 310, A.I.R. 1929 Pat. 595 (596), 120 I.C. 309; *Mahomed Cassim v. Jamila*, 6 Rang. 334, A.I.R. 1928 Rang. 282 (283), 111 I.C. 479.

Where the sureties had not made themselves liable for any part of their decretal amount, but had only made themselves personally liable for a certain amount, as distinct from the decree, the sureties were not co-judgment-debtors with the principal debtors, and an execution taken against them does not save limitation against the principal debtors—*Birendra v. Tulsi Charan*, 85 I.C. 657, A.I.R. 1926 Cal. 267.

If a decree is passed jointly against the judgment-debtor and his sureties, an application for execution against a judgment-debtor or against any one of the sureties affords a starting point for a fresh period of limitation in respect of a subsequent application, even though this latter application is made against a *different* surety—*Badr-ud-din v. Muhammad Hafiz*, 44 All. 743 (744), 20 A.L.J. 726, A I R. 1922 All. 481, 77 I C. 129.

Where a surety was liable for the principal debt only and not for interest and costs, an application for execution against the surety cannot operate to keep the decree alive in respect of a subsequent application for execution against the principal debtor to recover the interest and costs, because there was no joint liability of the surety with the principal debtor for interest and costs—*Kusaji v. Vinayak*, 23 Bom 478.

Explanation II—Proper Court—See Note 710 *ante*

- 183.—To enforce a Twelve When a present right to judgment, decree or years. enforce the judgment, order of any Court decree or order accrues to some person established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an Order of His Majesty in Council. capable of releasing the right; Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto

or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be.

This Article corresponds to Art. 180 of Act XV of 1877.

721A. Application.—The filing of a tabular statement in accordance with O. 21, r. 11 before the Master, who is the officer of the High Court designated to receive applications, amounts to an application to enforce the decree of the High Court under this Article—*Alarmoni v. Bepin*, 56 Cal 1341, A.I.R. 1929 Cal. 193 (195), 115 I.C. 83.

722. Order of the Privy Council:—Although an order of His Majesty in Council may confirm a decree of the Court below, that order is the paramount decision in the suit, and any application to enforce it is, in point of law, an application to execute the order and not the decree which it confirms. Article 183 applies to it, and time runs from the date of such order—*Luchman Pershad v. Kishan Pershad*, 8 Cal. 218; *Kamini Debi v. Aghore Nath*, 14 C.W.N. 357, 11 C.L.J. 91, 4 I.C. 402; *Fatleh Narain v. Chundrabati*, 20 Cal. 551; *Narsingh Das v. Narain Das*, 2 All 763.

But an order of the Privy Council dismissing an appeal for want of prosecution is not an order which judicially deals with the matter in suit; therefore it is not an order contemplated by this Article. The only decree capable of execution is the High Court's appellate decree, and not the order of the Privy Council, and consequently Article 182, and not Article 183, applies—*Abdul Majid v. Jawahir*, 36 All. 350 (353) (P.C.), 18 C.W.N. 963, 12 A.L.J. 624, 27 M.L.J. 17, 16 Bom L.R. 395, 23 I.C. 649, A.I.R. 1914 P.C. 66 (reversing 33 All. 154).

An application for execution of a final decree prepared by the District Judge in pursuance of an Order-in-Council passed on an appeal against a preliminary decree in a mortgage suit is governed by this Article and not by Article 182, since it is really one to enforce an Order of the Privy Council and not the decree of the District Judge. The preparation of the final decree by the District Judge is purely a ministerial act to enable the order of His Majesty in Council to be enforced—*Bhagwant v. Dewan Zamir Ahmad*, 3 Pat. 596 (605), 5 P.L.T. 451, A.I.R. 1924 Pat. 576, 78 I.C. 760.

Whether the order passed by His Majesty in Council be right or wrong, the Indian Courts are not competent to go behind that order, but are bound to give effect to that order, and to punctually observe, obey and

carry the same into execution—*Somer Singh v. Prem Dei*, 3 Pat. 327 (332), A.I.R. 1925 Pat. 40, 5 P.L.T. 21, 79 I.C. 794.

722A. "Enforce":—Where a High Court in the exercise of its ordinary original civil jurisdiction passed a decree for sale under section 88 (old) of the Transfer of Property Act, an application under section 89 of that Act for an order absolute for sale of the mortgaged property was held to be an application to "enforce" the preliminary decree. The word "enforce" is not limited to realisation by execution, but may have a wider meaning, e.g., the passing of an order absolute for sale—*Munna Lal v. Sarat*, 42 Cal. 776 (779) (P.C.) (affirming *Amlook v. Sarat*, 38 Cal. 913). This decision was given with reference to the law as it stood before the passing of the C. P. Code, 1908. After the passing of this new Code, the application by a mortgage-decree-holder under O 34, r 5 is an application for a final decree for sale (as distinguished from an application for an order absolute for sale), and it is doubtful whether the above ruling would apply under the new Code.

An application to enforce an order absolute for sale passed by the High Court must be made within 12 years from the date of passing the order—*Apurba Krishna v. Rash Behary*, 47 Cal. 746, 60 I.C. 880.

An application for a personal decree under O 34, r 6 C. P. Code, is an application for a new decree, and is not an application to enforce a judgment or decree within the meaning of this Article—*Pell v. Gregory*, 52 Cal. 828 (F.B.), 29 C.W.N. 678, A.I.R. 1925 Cal. 834, 89 I.C. 1.

An application under sec. 144 C. P. Code for restoration to possession of property which had been taken possession of by the other party in execution of a decree of the High Court, which had since been reversed by the Privy Council, is an application to enforce an order of the Privy Council, and is governed by this Article—*Brij Lal v. Damodar*, 44 All. 555, 20 A.L.J. 456, 66 I.C. 545, A.I.R. 1922 All. 238; *Sohan v. Baijnath*, 50 All. 767, 26 A.L.J. 587, A.I.R. 1928 All. 293 (294), 112 I.C. 876. Where the High Court directed that the appellant should pay costs to the respondent, who thereupon realised the costs, but the Privy Council on appeal directed the parties to pay their own costs, an application by the appellant under sec. 144 C. P. Code to recover the costs realised by the respondent is an application to enforce the order of the Privy Council and falls under Article 183—*Madhusudan v. Brij Lal*, 61 I.C. 806 (All.).

Since an application to enforce a decree is virtually an application for execution of a decree, a minor is entitled to claim the benefit of sec. 6—*Kurgodigouda v. Ningangouda*, 41 Bom. 625 (629), 19 Bom. L.R. 638, 41 I.C. 238.

723. Decree of the High Court—This Article applies to a judgment of the High Court in its insolvency jurisdiction, because such a judgment is one passed by the High Court in the exercise of its ordinary original civil jurisdiction, and not by way of special or extraordinary action—*In the matter of Condas Narrondas*, 13 Bom. 520 (533) (P.C.).

But a decree does not become a decree of the High Court merely because it has been transferred to that Court for execution and may have to be enforced in the same manner as a decree of the High Court—per Trevelyn J. in *Jogemaya v. Thackomani*, 24 Cal. 473 (491). The rule of limitation depends upon the status of the Court which passed the decree, and not upon the status of the Court executing it, and so if a decree of a mofussil Court is transferred to the High Court for execution, the limitation for execution is 3 years and not 12 years—*Tincowrie v. Debendra*, 17 Cal. 491. So also, a decree passed by the High Court on appeal from a mofussil Court is not a decree of the High Court within the meaning of this Article—*Kisto Kinkar v. Burrodacaunt*, 10 B.L.R. 101 (P.C.), 17 W.R. 292; *Ram Charan v. Lakhi Kant*, 7 B.L.R. 704 (F.B.), 16 W.R. 1.

Under sec. 15 of the Arbitration Act (1899), an award filed in Court is enforceable as if it were a decree of that Court and for the purposes of execution is governed by the period of limitation prescribed for execution of decrees of that Court. Consequently, an award filed in the Chartered High Court under that section is governed by Article 183 of the Limitation Act—*Belvedere Jute Mills Ltd. v. Hardwarimull & Co.*, 31 C.W.N. 1097, 104 I.C. 808, A.I.R. 1927 Cal. 853.

If a decree passed by the late Chief Court of Lower Burma is executed by the Rangoon High Court which has succeeded it, the decree does not become a decree of the High Court. Consequently Art. 182 applies, and not Art. 183. Sec. 26 of the Burma Courts Act (IX of 1922) simply lays down that the decree passed by the Chief Court "shall be deemed for the purposes of execution to have been passed or made by the High Court." The object of this section is simply and solely to provide for the execution of decrees of Chief Court by the High Court; it is not intended that a decree of the Chief Court should come under a different law of limitation simply because it is executed by the High Court. It does not say that the decree shall be deemed to be a decree of the High Court for all purposes—*Alibhai v. Md. Noormahomed*, 6 Rang. 566, A.I.R. 1928 Rang. 317, 114 I.C. 674.

724. Revivor—The word "revivor" is a term of art, which the Legislature ought to have defined but has not defined. It is a term borrowed from English law, and in the absence of a definition in this Act, the Indian Judges and lawyers have to grope among the English authorities in the quest of a guiding principle—*Palaniappa v. Vallammai*, 52 Mad. 590, A.I.R. 1929 Mad. 252 (254), 118 I.C. 775. In using the term 'revivor of judgment' in this Article the Legislature had in view the procedure embodied in section 218 C. P. Code 1882, the object of which was to give notice so as to prevent undue surprise to a judgment-debtor, where more than one year had elapsed between the date of the decree and the application for execution, or when the decree was sought to be enforced against the legal representatives of the party against whom the decree was originally made—*Jogendra v. Shyam Das*, 36 Cal. 543. The Statute of limitation to which the judgment is subject ceases to run upon a revivor

of judgment, and time runs afresh from the date of the revivor—*Ibid.* This doctrine of revivor owes its origin to the writ of *scire facias* prevailing in English and Irish Courts. By the common law of England, in the case of judgments in personal actions, if more than a year and a day passed without execution, the plaintiff was not entitled to take execution without a writ of *scire facias*; and the effect of an award of execution in pursuance of the *scire facias* was to revive the judgment. The writ of *scire facias* is now almost out of use in England, and is replaced by the equitable remedy of filing a bill of revivor.

To constitute a revivor of the decree, there must be expressly or by implication a determination that the decree is still capable of execution and that the decree-holder is entitled to enforce it. An order for execution of the decree made after notice to the judgment-debtor (to show cause why execution should not issue) as provided for in section 248 (now O. 21, r. 22) C. P. Code will operate as a revivor because it necessarily implies such a determination—*Kamini v. Aghore*, 14 C.W.N. 357, 11 C.L.J. 91, 4 I.C. 402; *Jogendra v. Shyam Das*, 36 Cal. 543, 9 C.L.J. 271 (dissenting from *Tincowrie v. Debendra*, 17 Cal. 491); *Tribikram v. Badri*, 1 P.L.J. 385, 20 C.W.N. 1051, 36 I.C. 633; *Futteh Narain v. Chandrabati*, 20 Cal. 551; *Suja Hossein v. Monohar*, 24 Cal. 244 (247); *Umrao v. Lachmi*, 26 All. 361 (364). An order for execution under the C. P. Code made after notice to show cause has the effect of reviving the judgment—*Ashootosh v. Doorga*, 6 Cal. 504 (511); *Ganapathi v. Balasundara*, 7 Mad. 540 (543). But the mere fact that an application has been made and notice has been issued to the judgment-debtor, without their terminating in an order for execution cannot create a revivor of the decree—*Manohar v. Futteh Chand*, 30 Cal. 979, 7 C.W.N. 793.

Where the objection of the judgment-debtor as to limitation was overruled, and it was decided that the decree was not barred by limitation, the effect of the order was to entitle the decree-holder to proceed with the execution, and there was consequently a revivor of the decree—*Kamini v. Aghore*, 14 C.W.N. 357, 11 C.L.J. 91, 4 I.C. 402. But where on an application being made for execution, one of the judgment-debtors applied for adjournment and obtained leave to sue for a declaration that he was not bound by the decree on the ground that he was not a partner of the defendant-firm against which the decree was obtained, and then the suit was dismissed on the ground that he was a partner, held that the dismissal of that suit did not amount to a revivor of the decree; the only point for determination in that suit was whether the judgment-debtor was or was not a partner of the firm, no question of the decree-holder's right to execute the decree was raised therein, and the order of dismissal could not be regarded as an order determining the question whether the decree-holder had a subsisting right to execute the decree—*Muthiar v. Chidambaram*, 55 Cal. 578, 32 C.W.N. 336 (341, 342), 110 I.C. 404, A.I.R. 1928 Cal. 686. If a decree is assigned, and the Court has recognised the assignment and has passed an order allowing the assignee to execute it, that amounts to a revivor and gives a fresh starting point of limitation—

Palaniappa v. Valiammai, 52 Mad. 590, A.I.R. 1929 Mad. 252 (256), 118 I.C. 775.

An order for execution made after one year from the date of the decree, *without issue of notice to the judgment-debtor* under section 248 C. P. Code has not the effect of reviving the decree—*Venkatesa Perumal v. Srinivasa*, 33 Mad. 187.

Where an Order in Council is transmitted to a subordinate Court for execution *without any notice* being given to the judgment-debtors, it would not be a revivor of the Order—*Tribikram v. Badri*, 1 P.L.J. 385, 20 C.W.N. 1051, 36 I.C. 633.

An application for the transfer of a decree from the High Court to the District Court is not itself an application for execution and does not amount to a revivor of the decree—*Chatterput v. Santa Sumari Mull*, 43 Cal. 903 (F.B.), 20 C.W.N. 889, 36 I.C. 602; *Supa Hussein v. Monohar Das*, 22 Cal. 921; *Khaja Sahebuddin v. Afzal Begam*, 28 C.W.N. 963, 84 I.C. 68, A.I.R. 1925 Cal. 23; *Narain Das v. Banku Behari*, 78 I.C. 1001, A.I.R. 1925 Cal. 213, affirmed by the Privy Council in *Banku Behari v. Narain Das*, 54 Cal. 500 (P.C.), 31 C.W.N. 589, A.I.R. 1927 P.C. 73, 101 I.C. 24, *Palaniappa v. Valiammai*, 52 Mad. 590, A.I.R. 1929 Mad. 252 (253), 118 I.C. 775, even if upon such application an order is passed for transfer of the decree, such an order is not an order for execution; nor does it show that the Court is of opinion that the execution is not barred. Consequently, it has not the effect of a revivor—*Chatterput v. Daya Chand*, 23 C.L.J. 641, 11 I.C. 216; *Suja Hussein v. Monohar Das*, 22 Cal. 921. But if an application for transfer of a decree is made after the expiry of one year, and the Court acting under sec. 248 C. P. Code (O. 21, r. 22) issues a notice to show cause why execution should not be granted, and on no cause being shown by the judgment-debtor, the Court makes an order for the transfer of the decree and the issue of a certified copy of the decree with a certificate of non-satisfaction, the order of the Court amounts to a revivor of the decree—*Suja Hossein v. Monohur*, 24 Cal. 244 (247) (following 6 Cal. 504 and 20 Cal. 551); *Umrao v. Lachmi*, 20 All. 361 (364). If an assignee of a decree applies for transfer of the decree to another Court for execution, and the Court passes an order transferring the decree and allowing the assignee to execute the decree, the order amounts to a revivor of the decree—*Palaniappa v. Valiammai*, *supra*.

Where execution cannot proceed without leave of the Court, the granting of the leave is a revivor of the decree. But as no leave is necessary for the arrest of the judgment-debtor, the superfluous issue of a notice under section 245B C. P. Code (O. 21, r. 37) is not a revivor—*Chatterput v. Daya Chand*, 23 C.L.J. 641, 11 I.C. 216.

As observed before, to constitute a revivor there must be a determination that the decree is capable of execution, and that the decree-holder is entitled to enforce it; and such determination must be made by a Court or person duly qualified to make it. Where after issue of notice under sec. 248 C. P. Code 1892 (O. 21, r. 22, C. P. Code 1908) and the judg-

ment-debtor not appearing, the *Registrar* ordered execution to issue, it was held that there was no *judicial* determination of the question whether the decree was capable of execution, and consequently the order did not constitute a revivor. The order of the Registrar was merely a ministerial act—*Chatterpat v. Saita Sumarimull*, 43 Cal. 903 (F.B.), 36 I.C. 602; *Narain Das v. Banku Behari*, A.I.R. 1925 Cal. 213, 78 I.C. 1001. O. 21, r. 16 (proviso) C. P. Code lays down that if a decree is assigned, and the assignee applies for execution, notice of the application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections, if any. If, however, such notices have been given, and those persons did not appear to prefer any objection, and then the Registrar or Deputy Registrar, acting on behalf of the Court, passes an order for execution or an order for transmission of the decree to another Court for execution, such an order is not merely a ministerial act, but an *order of the Court speaking through the Registrar*, and constitutes a revivor—*Palaniappa v. Valiammai*, 52 Mad. 590, A.I.R. 1929 Mad. 252 (256), 118 I.C. 775, 56 M.L.J. 555.

A revivor of decree against one of two judgment-debtors would not keep the decree alive against the other judgment-debtor—*Krishnaiyah v. Gajendra*, 40 Mad. 1127, 33 M.L.J. 533, 40 I.C. 608. A decree was passed against two persons in 1900, in the original side of the High Court. An application was made in 1903 for execution against one judgment-debtor only, and an order was made granting execution against him. In 1914 the decree-holder applied for execution against the other judgment-debtor. It was held that this application was barred, in as much as the revivor of the decree against one of the judgment-debtors did not save the decree from being barred as against the other judgment-debtor after 12 years from the date of the decree—*McLaren v. Veeriah*, 38 Mad. 1102, 38 I.C. 1003.

"Payment" —A fresh starting point is given from the time of payment, i.e., the date of actual payment and not the date of order of payment passed by the Court—*Subapathi v. Shanmugappa*, 46 M.L.J. 453, A.I.R. 1924 Mad. 638, 78 I.C. 832.

The payment is not required to be made either by the judgment-debtor or by some person *duly authorised* by him in that behalf. It is sufficient if payment is made by some person on behalf of the judgment-debtor. The words of section 20 are not to be imported into this Article—*Probappa v. Desikachari*, 49 M.L.J. 101, 90 I.C. 1928, A.I.R. 1925 Mad. 1131.

725. Section 48 C. P. Code.—This Article is independent of sec. 230 C. P. Code 1882 (sec. 48 C. P. Code 1908) and not controlled by it. According to the express provisions of this Article, the decree-holder is entitled to a fresh period of 12 years from the date of every revivor, payment or acknowledgment; therefore the limitation provisions contained in section 48 C. P. Code does not apply to cases governed by this Article—*Mayabhai v. Trivuban Das*, 6 Bom. 258; *Ganapathi v. Balasundara*, 7 Mad. 540 (544); *Futteh Narain v. Chandrabati*, 20 Cal.

311. Section 48, C. P. Code ought not to be so construed as to conflict with the provisions of this Article of the Limitation Act. The provisions of the two Acts ought not to be so interpreted as to contradict each other, and section 230 of the Code of 1882 cannot be taken to limit this Article—*Jogendra v. State Dist*, 36 Cal. 543. Note that section 48 (2) (b) of the new C. P. Code of 1908 expressly exempts this Article from the operation of that section.

SECOND SCHEDULE.

[REPEALED BY THE REPEALING AND AMENDING
ACT VIII OF 1930.]

THIRD SCHEDULE.

[REPEALED BY THE SECOND AMENDING AND
REPEALING ACT XVII OF 1914.]

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